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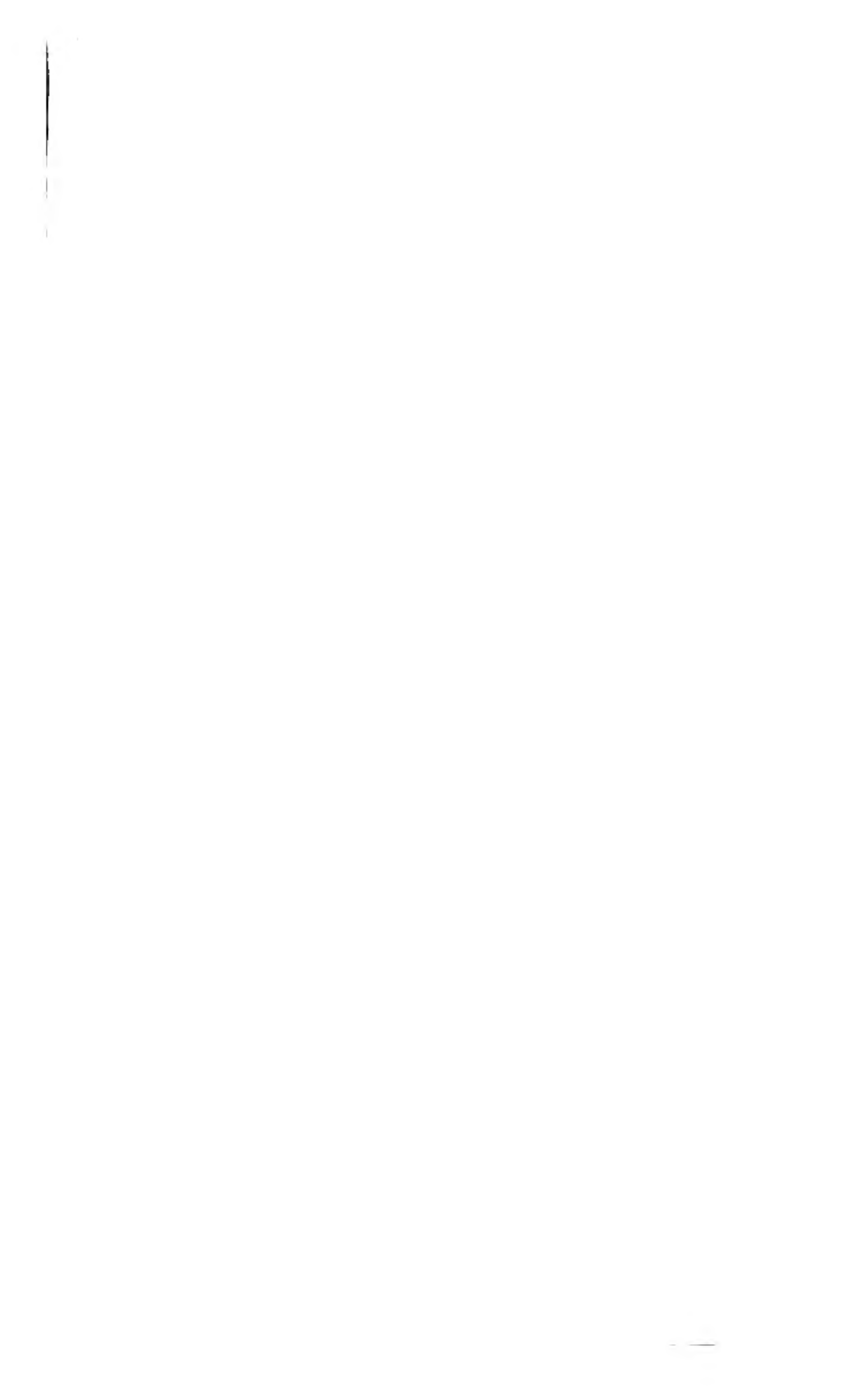
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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN
THE COURTS OF THE SEVERAL STATES
FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. LVIII.

SAN FRANCISCO:
BANCROFT-WHITNEY CO.
LAW PUBLISHERS AND LAW BOOKSELLERS.
1886.

121759

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AMERICAN DECISIONS.

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AMERICAN DECISIONS
VOL. LVIII.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

STUART v. CLARK'S LESSEE.

[2 SWAN, 9.]

TERM "NAVIGABLE RIVER" IN COMMON LAW applies to those rivers in which the tide ebbs and flows.

TERM "NAVIGABLE RIVER" IN CIVIL LAW applies to those rivers capable of being navigated regardless of the ebb and flow of the tide.

OWNERSHIP OF SOIL COVERED BY WATERS OF NAVIGABLE RIVER is vested in the public.

OWNERSHIP OF SOIL COVERED BY WATERS OF UNNAVIGABLE RIVER is vested in the riparian proprietors.

EJECTMENT. Appeal from the circuit court of Washington county. The facts are stated in the opinion.

T. A. R. Nelson, for the plaintiff in error.

Arnold, for the defendant in error.

By Court, **McKINNEY, J.** This was an action of ejectment in the circuit court of Washington county, brought for the recovery of a small island in the Nolachucky river. The lessor of the plaintiff claims title under a grant from this state, dated the twenty-first of July, 1842, for twenty acres, covering a portion of the bed of the river, from bank to bank, and expressly calling to include the island in controversy. The plaintiff in error, who was defendant in the action, claims title to said island under a grant from the state of North Carolina to Cornelius O'Neal, for two hundred acres, dated the twenty-sixth of October, 1786. This grant calls to begin at a marked tree on the bank of Nolachucky river; thence various courses and distances,

to a stake on the bank of said river, at a different point; and "then up the different meanders of the said river to the place of beginning."

The decision rests upon the question whether or not the Nolachucky river is a navigable stream, in the legal sense of that term. If it be such, then it is clear that the boundary of the O'Neal grant would be the margin of the river, and the island in controversy would not be included in said grant, but would pass to the lessor of the plaintiff under his younger grant, which in terms embraces it. If it be not a navigable stream, then it is equally clear that said island is covered by the O'Neal grant, upon the well-established principle of construction that grants of land bounded on rivers, or upon the margins of the same, or along the same, convey the exclusive right and title of the grantee to the centre or thread of the stream, unless the terms of the grant limit the boundary to the margin of the river—said island lying adjacent to the bank of the river, covered by the O'Neal grant, and exclusively between said bank and the center of the stream.

Without stopping to notice the proof in the record, or to comment on the charge of the court, we will confine ourselves to a brief discussion of the legal principles which, we think, apply to the case.

By the common law all tide-water rivers are navigable to the extent of the flow and reflow of the tide, and the absolute proprietary interest in the same is in the crown; the right of soil of owners of land bounded by such tide-water streams extending only to high-water mark. The term "navigable" has in law a technical sense; and as applied to rivers, in England, does not mean such as in their ordinary state are navigable in fact, but only to those in which the tide ebbs and flows, and so far only as the influence of the tide extends; above the line where the tide ceases to have effect the rule of property is reversed, and the property in the soil, or bed of the river, is in the riparian proprietors. And such also is the principle of the common law in reference to all streams not navigable in the legal sense.

The rule of the common law, as to what is a navigable river, namely, the flow and reflow of the tide, was declared by this court, in *Elder v. Burrus*, 6 Humph. 358, 366, to be inapplicable to this state; and such has been the course of decisions in some of the other American courts. This criterion, as applied to England, may be appropriate and practical, because perhaps it

embraces pretty much the entire extent of all rivers which, in point of fact, are navigable; but it would be most absurd in its application to our large fresh-water rivers, which, though not subject to the influence of the tide, are yet fitted by nature, in their ordinary state, for all the common purposes of navigation.

The court, in *Elder v. Burrus*, *supra*, rejected the common-law rule, and followed the rule of the civil law, as to what constitutes a navigable river. According to the civil law, "navigable rivers are not merely rivers in which the tide flows and reflows, but rivers capable of being navigated; that is, navigable in the common sense of the term. In the words of the digest, a navigable river is *statio iturre navigio*: Angell on Watercourses, sec. 550.

In Pennsylvania, the common law has been held inapplicable to the great inland rivers of that state, and that the owners of the land on their banks do not, therefore, acquire any right to the soil covered by the waters of such rivers, but that the soil and waters remain in the public: *Carson v. Blazer*, 2 Binn. 475 [4 Am. Dec. 463]; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71.

In North Carolina, it is settled that the ebbing and flowing of the tide is not the sole test of a navigable river. That if a river be deep enough for sea vessels to navigate to and from the ocean, it is a navigable stream, and the boundary of the adjacent land is not the thread or middle of the channel: *Wilson v. Forbes*, 2 Dev. L. 30; *Ingram v. Threadgill*, 3 Id. 59. In *Collins v. Benbury*, 3 Ired. L. 277 [38 Am. Dec. 722], the court said a navigable stream existed when the waters were sufficient in fact to afford a common passage for people in sea vessels. The same general doctrine has been held in South Carolina: *Cates v. Wadlington*, 1 McCord, 580 [10 Am. Dec. 699].

It is to be remarked, that the only change of the common law effected by the adoption of the rule of the civil law, with us, is the substitution of a new and more appropriate criterion of a navigable river; and that is, not the flow and reflow of the tide, but simply the fact whether the river, in the ordinary state of the water, is capable of and suited to the usual purposes of navigation. In all other respects, the principles of the common law, regulating and defining the respective rights of the public and of the riparian proprietors in rivers of whatever character, remain unchanged, and are to be applied by our courts.

But it is to be borne in mind that, although we have adopted a new test of the navigableness of rivers, different from that of the common law, still, the term "navigable," as applied to

streams, is no less a word of technical meaning than at common law; and the distinction between the technical sense of the term and its common acceptation is important to be kept in view, in inquiring into the respective rights of the public and the riparian owners, in reference to the property in the soil, as well as in the use of watercourses.

We feel the difficulty of the attempt, under the rule of the civil law, to define with exact precision what is a navigable river, in the legal sense of the term. We are aware of no less exceptionable criterion than that to be extracted from some of the cases before referred to, namely, a river capable, in the ordinary state of the water, of navigation, ascending and descending, by sea vessels; that is, such vessels as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail vessels.

The only view in which it becomes a matter of any great practical importance to distinguish between rivers that are navigable in the technical sense and those that are not so is in reference to the rights of the public and the adjacent owners, in respect to the ownership of the bed of the stream; for, so far as regards the use of the stream for all purposes of navigation, the public have the same right whether it be navigable or not navigable.

If the river be a public navigable stream in the legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. But if it be not navigable in the legal meaning of the term—as is the case in England as to all streams above the flow of the tide—the ownership of the bed of the stream is in the riparian proprietors, but the public have an easement therein for the purposes of transportation and commercial intercourse. A distinction is taken by the common law between streams which, in the common acceptation of the term, are suited to some purposes of navigation, and small, shallow streams which are not so. In respect to the former—which, though not navigable in the sense of the law, are yet of sufficient depth, naturally, for valuable floatage, as for rafts, flat boats, and perhaps small vessels of lighter draft than ordinary—while it is settled that the right of property in the bed of the stream is vested in the riparian proprietor, and in that respect it is to be regarded as private river; still it is equally well settled that the public have a right to the free and uninterrupted use and enjoyment of such stream for all the purposes of transportation and navigation to which it is naturally adapted. And this easement, or “servitude of public interest,” in the phrase of the

Roman law, is as absolute and unlimited in the public, in reference to this class of rivers, as to rivers navigable in the technical meaning of the term.

But as to shallow streams, unfit for such purposes of transportation and commerce, both the right of property and use are wholly and absolutely in the owner of the adjoining lands: Angell on Watercourses, secs. 535, 539, and the authorities there referred to; 3 Kent's Com. 411, 427.

From the foregoing principles, it necessarily follows that the judgment in the present case is erroneous, and must be reversed for misdirection of the court in the charge to the jury.

Having considered this case upon the principles of law involved in it, rather than upon the facts, we do not feel it incumbent upon us to express any opinion as to the character of the Nolachucky river—whether navigable or otherwise. This question, however, upon the principles herein laid down, will be of no difficult solution.

Neither have we deemed it material to notice particularly the act of 1799, chapter 35, and other subsequent acts of like import—declaring that the navigation of Nolachucky and certain other rivers “shall be and remain free and open;” and affixing a penalty for any obstruction thereof. We suppose that legislation of this character was neither designed to have, nor can be allowed to have, any effect whatever upon the rights of the riparian proprietors. More especially can it have no effect upon such rights acquired prior to the date of the earliest statute upon the subject. But these acts, so far as they provide that the rivers shall remain open and free for purposes of navigation, are merely declaratory of the common law, as has already been shown.

The competency of the legislature to affect the rights of the riparian owner, without compensation to him, is a point which calls for no discussion in this case.

The general principle asserted in the case of *Elder v. Burrus*, previously noticed, is fully approved; but the application of that principle to the facts of the particular case—so far as that may be inconsistent with the general principles herein laid down—we are not prepared to sanction.

Judgment reversed.

NAVIGABLE RIVERS, WHAT ARE: See *Carson v. Blaser*, 4 Am. Dec. 463; *Arnold v. Mundy*, 10 Id. 356; *Cates v. Wadlington*, Id. 699; *Hooker v. Cummings*, 11 Id. 249; *Commonwealth v. Chapin*, 16 Id. 386; *Martin v. Jett*, 32 Id. 120; *Collins v. Benbury*, 38 Id. 722; *State v. Thompson*, 47 Id. 588; *People v. City of St. Louis*, 48 Id. 339; *McOullough v. Wall*, 53 Id. 715.

OWNERSHIP OR PROPERTY IN WATERCOURSE: See *Home v. Richards*, 2 Am. Dec. 574; *Gardner v. Newburgh*, 7 Id. 528; *Arnold v. Mundy*, 10 Id. 354; *Cates v. Wadlington*, Id. 699; *Rogers v. Jones*, 19 Id. 493; *Chapman v. Kimball*, 21 Id. 707; *Barker v. Bates*, 23 Id. 573; *Hagan v. Campbell*, 33 Id. 267; *Mayor etc. of Mobile v. Eslava*, Id. 325; *Parker v. Cutler Milldam Co.*, 37 Id. 56; *Collins v. Benbury*, 38 Id. 722; S. C., 42 Id. 155; *Bailey v. P. W. & B. R. R. Co.*, 44 Id. 593; *McCullough v. Wall*, 53 Id. 715.

PEARCE v. HAWKINS.

[2 SWAN, 87.]

PARTY INELIGIBLE TO OFFICE OF CONSTABLE, although invested with the forms of office and his official acts deemed good and valid as to third persons, as if he were an officer *de jure*, can not when put on his own defense justify under his office.

TROVER. Appeal from the circuit court of Bradley county. The facts are stated in the opinion.

Trewhitt, for the plaintiff in error.

Rowles and Gaut, for the defendant in error.

By Court, TOTTEN, J. Trover for a horse. The defendant justifies the seizure and sale of the property in question, in virtue of his office of constable, and the process in his hands. But as he was resident of in the tenth civil district when elected constable for the eleventh, he was ineligible to the office, and his appointment was void.

And in an action against him for an alleged trespass, he can not defend and justify the act as being done in virtue of his office, when it is made to appear that he has no title thereto, and that his assumed appointment was illegal and void.

It is true, that being invested with the forms of office, his official acts will be deemed good and valid as to third persons in the same manner as if he had been an officer *de jure*. But when put on his own defense he can not justify under his office, if it appear that he is not a legal officer, but only an officer *de facto*. If this were not so, then there is no difference between a legal and an illegal appointment to office, and an officer *de facto* is the same as an officer *de jure*, which is absurd.

Reverse the judgment, and remand the cause for a new trial.

DE FACTO OFFICERS, ACTS OF, EFFECTUAL AS TO THIRD PERSONS: *Buckman v. Ruggles*, 8 Am. Dec. 98; *Hildreth v. McIntire*, 19 Id. 61; *Wilcox v. Smith*, 21 Id. 213; *Burke v. Elliott*, 42 Id. 142; *Farmers' and Merchants' Bank v. Chester*, 44 Id. 318; *Plymouth v. Painter*, Id. 574; *Brooks v. Rooney*, 56 Id. 430.

DE FACTO OFFICER, ACTS OF, INVALID AS TO HIMSELF: See cases cited in the note to *Hildreth v. McIntire*, 19 Am. Dec. 68.

THE PRINCIPAL CASE WAS CITED AND FOLLOWED in *Venable v. Curd*, 2 Head, 586; *Ward v. State*, 2 Coldw. 608; *Galbraith v. McFarland*, 3 Id. 277.

KEATON v. THOMASSON'S LESSEE.

[2 SWAN, 138.]

WHERE EXECUTION SALE OF REAL ESTATE had been made, but the sheriff's deed conveying the same was not executed for upwards of two years thereafter, *held*, that the statute of limitations began to run from the date of the sale.

JUDGMENT DEBTOR IS NOT DIVESTED OF TITLE to real estate by levy of an execution thereon.

PURCHASER OF REAL ESTATE AT EXECUTION SALE is immediately entitled to a deed, and having obtained the same, he may resort to ejectment to obtain possession.

EJECTMENT. Appeal from the circuit court of Cannon county. The facts are stated in the opinion.

Ready and Fare, for the plaintiff in error.

E. A. Keeble and G. W. Thompson, for the defendant in error.

By Court, McKINNEY, J. This was an action of ejectment, in the circuit court of Cannon, brought by the defendant against the plaintiff in error.

The lessor of the plaintiff claims title to the premises described in the declaration, under a purchase at execution sale.

On the eighteenth of January, 1839, Thomasson recovered a judgment against Keaton, in the circuit court of Cannon, upon which an execution issued, and was levied on the tract of land first described in the declaration.

On the twelfth of May, 1840, said tract of land was sold by the sheriff, and Thomasson, the judgment creditor, became the purchaser; but the sheriff's deed, conveying to him said tract of land, was not executed until the twenty-third of December, 1844.

The present action was commenced on the fifteenth of September, 1848, against Keaton, the judgment debtor, who was in the actual possession of said tract of land at the time of the levy and sale, and who has ever since continued in possession thereof, "claiming to hold for himself."

More than seven years having elapsed between the sale of said tract of land and the commencement of this action, during all

which time Keaton was in possession, claiming to hold the land for himself, the statute of limitations was relied upon as a bar to the recovery sought by the lessor of the plaintiff.

And with reference to this ground of defense, the circuit judge instructed the jury that "the statute of limitations did not commence to run in favor of the defendant until after the sheriff's deed was executed" to the lessor of the plaintiff.

This instruction was clearly erroneous. It is true that the effect of an execution sale of real property is very different from that of personal property. The levy of an execution upon personal chattels divests the title of the debtor, and vests it in the sheriff; and by the mere force of the sale and delivery of possession to the purchaser, he becomes vested with a legal title to the property purchased. But such is not the legal result in the case of real estate. The levy of an execution upon land does not divest the title of the judgment debtor. It vests the sheriff with no interest in the property, neither the legal title nor possession is transferred to the purchaser by force of the sale.

The sheriff's deed, by operation of law, transfers the legal title to the purchaser, and he is left to resort to an action of ejectment to gain the possession, if withheld by the former owner. By virtue of the levy and sale alone, the purchaser acquires at most only an equitable title to the land purchased: *Crutsinger v. Catron*, 10 Humph. 24. But as the sheriff's deed is founded on the levy and sale, it has relation, whenever executed, to such levy and sale, and vests the purchaser, by such relation, with the legal title, at least from the date of the sale, if not from the levy, which is the inception of the title: See *Parker v. Swan*, 1 Id. 80; *Wood v. Turner*, 8 Id. 685.

From the date of the sale at least the judgment debtor, in possession of the land sold, is in a condition to assert a claim adverse to that of the purchaser. The latter is immediately entitled to a deed, and to the possession of the land, if it can be acquired peaceably.

But whether he obtains a conveyance from the sheriff or not is wholly immaterial, so far as respects the operation of the statute of limitations, in favor of the judgment debtor remaining in possession, and claiming to hold adversely, in point of fact, to the title acquired by the purchaser; for although it be true that until the execution of the sheriff's deed the purchaser has only an equitable interest or title, and therefore could not sue in ejectment to recover possession of the premises; still, it is no less true that the statute of limitations of 1819 has pre-

cisely the same effect and operation upon equitable as upon legal titles, and alike protects the right of the person in possession, holding adversely as against both.

It would be absurd to suppose that the mere delay or negligence of the purchaser in procuring a deed from the sheriff could have the effect of preventing the bar of the statute from attaching in favor of the adverse possessor.

It is true that the judgment debtor, if he remain in possession after the sale, is regarded, in the absence of all evidence to the contrary, as occupying the relation of *quasi tenant at will* to the purchaser. But this is a mere presumption of law, which may be rebutted by showing that, in fact, he was holding adversely to the right of purchaser.

He is under none of the positive obligations growing out of the relation of tenant by actual contract.

His relation rests upon mere acquiescence, and may, by his own act, be put an end to at any moment: *Vance v. Johnson*, 10 Humph. 214, 221; *Farnsworth v. Fowler*, 1 Swan, 3 [55 Am. Dec. 718].

It follows that the judgment of the circuit court is erroneous, and must be reversed.

RELATION OF SHERIFFS' DEEDS.—The case of *Parker v. Swan*, 1 Humph. 80; S. C., 34 Am. Dec. 619, referred to in the principal case, was an action of ejectment brought by Swan to recover a tract of land which he claimed by virtue of a sheriff's deed. Judgment was rendered May 7, 1830. Execution issued May 12, 1830, and soon after the land was sold to Swan; the deed was dated April 5, 1831, and on the twenty-first of April following the deed was recorded. The defendants, Parker et al., claimed title by virtue of a deed from John Doak to Isaac Killough, dated May 5, 1830, and recorded July 15th following. The lower court informed the jury that the plaintiff's (Swan's) title related to the levy by the constable upon the land, and was not limited to the date of the deed or to the order of sale by the court. Parker appealed, but the supreme court affirmed the judgment below, citing the cases of *Lath v. Gibson*, 1 Murph. 266, and *Ellar v. Ray*, 2 Hawks, 568, as authorities. Another case cited in support of the rule prescribed in the principal case was that of *Wood v. Turner*, 8 Humph. 685. That case was one of forcible detainer. It appeared that the land in controversy was levied on as the property of the plaintiff Wood, by virtue of a judgment and execution against him, and was sold by the sheriff on the fourth day of November, 1843, and purchased by H. B. Hoover. The sheriff executed a deed to Hoover on the fifth day of November, 1845, and Hoover conveyed to the defendant Turner the following day. It was in evidence that the defendant rented the land from Wood during the year of 1844, and continued as his tenant in 1845. There was no evidence tending to show that the plaintiff Wood was in possession of the land at the time of levy and sale to Hoover. The jury were charged that "the judgment, levy, sale, and sheriff's deed dissolved the relation of landlord and tenant previously existing between the plaintiff and the defendant from and

after the execution of the deed by the sheriff to Hoover, the purchaser at the execution sale, and from that time the defendant became, by operation of law, the tenant of Hoover, and it was his duty to attorn to him." The supreme court held that the circuit judge erred "because the deed of the sheriff did not take effect at its date, but related to the sale, and vested in Hoover a legal title from that period." The other case referred to, that of *Crutsinger v. Catron*, 10 Id. 24, was where Catron claimed title to the premises in dispute by virtue of an entry made in the state land office. Crutsinger based his claim upon a sheriff's deed at public sale of the premises. In charging the jury, the court said that the levy and sale by the sheriff did not divest Catron of his legal title, inasmuch as he held adverse possession of the land for seven years after the judgment had been rendered. Crutsinger appealed. The judgment was affirmed, and in the opinion rendered the court remarked that "when an execution is levied upon land, no interest whatever is vested thereby in the sheriff; upon a sale made he does not pass the possession, for he has none to pass; but his deed of bargain and sale made thereon, by operation of law transfers the legal title, and the purchaser is entitled to his ejectment to get into possession." The doctrine of relation, as applied to sheriffs' sales, has been considered at length in some of the notes to the cases appearing in this series, particularly so in the note to *Jackson v. Ramsay*, 15 Am. Dec. 242. In that case the court held a sheriff's deed related back to the day of the execution sale. See the following cases, where this point has been fully discussed: *Jackson v. Bard*, 4 Id. 267; *Jackson v. Dickinson*, 8 Id. 236; *Morton v. Sanders' Heirs*, 19 Id. 128; *Million v. Riley*, 25 Id. 149; *Nellis v. Lathrop*, 34 Id. 285; *Ferguson v. Miles*, 44 Id. 702; *Owens v. Patteson*, Id. 780; *Oviatt v. Brown*, 45 Id. 539; *Rogers v. Brent*, 50 Id. 422; *Cavender v. Smith*, 56 Id. 541.

In *Jefferson v. Wendt*, 51 Cal. 573, a different rule was recognized. The facts of that case were about as follows: In March, 1865, a sale was made by the sheriff. In September of the same year the time for redemption expired. In November, the sheriff signed, sealed, and acknowledged a deed in pursuance of the sale, and placed it in a pigeon-hole in his office. Afterwards, during the years 1865 and 1866, the holder of the certificate of purchase was several times notified that the deed was ready at the sheriff's office, and requested to call for it. On each occasion he replied "that it was all right, he would call and get it." He did not, however, get the deed until 1873. In 1874 he commenced an action of ejectment based on this deed. The defendant pleaded the statute of limitations, which, in California, bars real actions after five years. The district court rendered judgment for the defendant, and the plaintiff appealed. The judgment was reversed for the reason that it was not apparent that there had been a delivery of the deed, and consequently the statute did not begin to run. Mr. Freeman, in commenting upon this case in 4 Cent. L. J. 197, said that "the meagerness of the foregoing opinion is such that we should forbear making any report of the case were it not evident from the transcript now before us that the court has decided a question which is both novel, difficult, and important. It is this: Can the purchaser at an execution sale, through his own failure to call for his deed, prevent the statute of limitations, for an indefinite period, from operating upon his claim? The question is here answered, as we believe, for the first time; and the answer is in the affirmative. There is nothing in the opinion of the court to disclose the reasoning of the court on which it is based, nor is there sufficient to show that the court was conscious of the full scope of its decision. Both in the subordinate and in the appellate court,

the question apparently considered was whether, under the facts proved, the deed had been delivered in 1865; and we think there can be no doubt that those facts did not establish any delivery. But it was unquestionably true that the plaintiff had, for nearly eight years, been entitled to such delivery. Statutes of limitations are commonly called statutes of repose. Their most beneficial operation is in preventing the assertion of stale claims. But in harmony with the result reached in this case, the purchaser at an execution sale may, by delaying to call for his deed, choose his own time to assert his title. This result, however startling, is perhaps the logical consequence of two undisputed rules of law, viz.: 1. That until the actual reception of his conveyance, the purchaser at an execution sale is not invested with the legal title nor with any right to the possession of the property sold: Freeman on Executions, sec. 323; 2. That prescription does not begin to run against any one until he has a right of action: Angell on Limitations, sec. 42. This last rule, we have always thought, ought not to extend to those persons who, as in the case under consideration, through their own choice or laches, delay obtaining some formal muniment of title essential to the transformation of an inchoate right into a perfect cause of action. Negligence ought not to be rewarded and diligence condemned."

LEVY OF EXECUTION UPON LAND DOES NOT DIVEST JUDGMENT DEBTOR OF TITLE THERETO: See *Barden v. McKinnie*, 15 Am. Dec. 519; *Beggs v. Thompson*, Id. 539; and note to *Waters v. Duvall*, 33 Id. 697.

MCKINNEY v. CLARKE.

[2 SWAN, 321.]

MARRIAGE IS EMPHATICALLY PERSONAL CONTRACT, having for its basis the mutual consent of the parties.

COURTS OF EQUITY CAN NOT UPON APPLICATION of third persons dissolve the bonds of matrimony, nor relieve against any of the consequences resulting from a marriage entered into from fraudulent motives.

MARRIAGE WHEN ANNULLED FOR FRAUD must be such a fraud as operates upon one or other of the immediate parties to the contract.

APPEAL from the chancery court at Fayetteville. The facts are stated in the opinion.

Kercheval, for the plaintiff.

F. B. Fogg and Ross, for the defendants.

By Court, MCKINNEY, J. This bill was brought to annul a marriage entered into, under all the forms of law, between the defendants, John and Mary Clarke, on the ground that said marriage was contracted not in good faith, but for the sole purpose of defeating the rights of the complainant, who was a judgment creditor of said Mary prior to the marriage.

It appears that the defendant Mary, for several years prior to

her marriage with defendant John Clarke, was the widow of Cornelius Sullivan, who died in 1846. By his last will and testament, said Cornelius devised and bequeathed to said Mary a plantation and six slaves "during her natural life or widowhood," with remainder to his children.

Some time prior to the marriage between said Mary and defendant Clarke, the complainant recovered several judgments against said Mary in her own right, and caused executions to be issued thereon, which were levied upon said tract of land and slaves held by her under the foregoing clause of her former husband's will.

After the levy, and shortly before the day appointed for the sale of said property, said Mary intermarried with the defendant Clarke. The marriage, in point of form, was solemnized in accordance with the prescribed ceremonies of the law, and with the mutual consent of the parties, both of whom were *sui juris*, and possessed of competent capacity to contract. But it is placed beyond all doubt, from the proof in the cause, that the main, if not the sole, inducement to the marriage on the part of said Mary was to put an end thereby to the estate vested in her during widowhood, under the before-mentioned will, so as to defeat the complainant's levy and the recovery of his debt. The motives and conduct of said Mary in forming this matrimonial alliance are of a character, as exhibited in this record, to shock the moral sense of the community and to outrage all the decencies of social life. It is probable, from the proof, that she has not in fact, and perhaps never intended, to cohabit with said Clarke, who is proved to be a drunken sot, degraded in reputation, and loathsome in appearance and habits. These and other facts established in the proof leave no doubt upon the mind that the object of the marriage was to defeat the rights of the complainant. Still, however, the parties themselves acquiesce in the marriage; profess to regard it as valid; recognize each other as husband and wife; and insist that there attaches to it all the legal rights, obligations, and consequences resulting from that relation.

The bill seeks to annul the marriage, and to subject the property to the satisfaction of the complainant's judgments, as if no such pretended marriage had taken place.

The chancellor decreed the marriage void, so far as respects the rights of the complainant, and ordered the interest of defendant Mary, in the property (which the decree assumes to be a life estate) to be sold for the satisfaction of complainant's

debt. From this decree the defendants (including the persons who claim the estate in remainder under the will) have presented an appeal in error to this court.

This is a novel case. The books to which we have had access have been searched in vain for a parallel. But upon principle, it presents no difficulty.

The jurisdiction of a court of equity to annul a marriage, on the ground of fraud, at the instance of one of the parties to the marriage contract, is a question which, as it does not arise upon this record, we will not at present discuss.

The question before us is, whether a court of equity has any jurisdiction to entertain a bill, brought by a stranger to the contract, to annul a marriage entered into by the mutual assent of parties capable of contracting, and valid according to the forms of municipal law, merely upon the ground, that the motive of the parties in contracting such marriage was to defeat, and that in its legal consequences it may defeat, some right or remedy of such third person, which otherwise might have been asserted. This question can admit of no debate.

Marriage is emphatically a personal contract, and its basis is the mutual consent of the parties. But, in the language of Mr. Story, Conf. L. 100, note 3, "it is something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts."

Unlike other contracts, it is indissoluble between the parties. When consummated according to law, it is of perpetual obligation, and can not be renounced at the will of either or of both parties. It continues to exist until a dissolution is produced either by the death of one of the parties or by a divorce: 2 Bla. Com. 440; 2 Kent Com. 94. It differs in another respect from all other contracts; the rights and duties growing out of it are not left to the option or agreement of the parties; but, to some extent, are matters of municipal regulation, over which the will of the parties can have no control: Story's Conf. L. 101. It continues to subsist in full force, even although one of the parties should be rendered incapable forever of performing his or her part of the mutual contract, as in case of incurable insanity, or the like: *Id.*

Such is the nature of the contract of marriage—an institution which lies at the very foundation of all social order and moral-

ity, and constitutes the chief corner-stone of the whole structure of civilized society.

The contract of marriage, then, having its foundation in nature, and resting, in its origin, upon the mere consent and mutual agreement of the parties, when complete according to civil regulations, becomes indissoluble, except by death or divorce; and so long as the relation is acquiesced in by the immediate parties, no tribunal on earth is clothed with the jurisdiction to interpose to annul it. No more startling or absurd proposition can be conceived than that a marriage, legal in form, acquiesced in and held obligatory by the parties, and recognized as valid by law, might be annulled at the instance of a third person for any cause whatever. So far as regards the legal consequences resulting from marriage, either as respects the parties or third persons, it can be of no consequence what were the motives or inducements to the contract. The only inquiry, at least as to third persons, is, Does a marriage in fact exist according to the prescribed forms of law? If so, the motive which prompted to the marriage, or the consequences flowing from it, are wholly irrelevant, so far as relates to the validity or effect of such marriage.

If a marriage may be annulled for fraud, it must be such a fraud as operates upon one or other of the immediate parties to the contract, and has the legal effect of vitiating the contract between the parties *ab initio*. But as respects strangers, fraud can not be predicated of a contract which the immediate parties thereto may lawfully enter into, which no principle of municipal law forbids, or can restrain the consummation of.

From these obvious principles it results, that to entertain the present bill would be a usurpation of jurisdiction conferred upon no human tribunal; and which, consistently with the fundamental principles of society, never can be.

The interest of the defendant Mary was an estate upon condition; and her subsequent marriage with the other defendant was an absolute forfeiture of that estate as to herself, her creditors, and all other persons. This forfeiture she might incur at pleasure; it depended solely upon her own volition and act; and no power known to our law could have restrained her from doing so. It would be grossly paradoxical, then, to hold that a forfeiture lawfully incurred could be relieved against; or, that a court of equity, though powerless to prevent the forfeiture by restraining the marriage, had nevertheless the jurisdiction to relieve against the consequences of such forfeiture.

But it is needless to pursue this discussion further, as the want of all such jurisdiction admits of no question.

The decree will be reversed, and the bill be dismissed.

MARRIAGE IS CIVIL CONTRACT required to be celebrated in some public manner before a civil magistrate or minister of the gospel: *Mountholly v. Andover*, 34 Am. Dec. 685; *Fornhill v. Murray*, 18 Id. 344, and notes citing prior cases in this series.

MARRIAGE PROCURED BY FRAUD will be vacated in equity at the suit of the innocent party: *Ferlat v. Gojon*, 14 Am. Dec. 554.

THIRD PERSONS CAN NOT INSTITUTE PROCEEDINGS TO ANNUL MARRIAGE: *Mountholly v. Andover*, 34 Am. Dec. 685.

THE PRINCIPAL CASE WAS CITED in *Castellar v. Simmons*, Thomp. Cas. 93.

SHADDON v. KNOTT.

[2 SWAN, 358.]

SALE OF PERSONAL PROPERTY IS COMPLETE as soon as both parties have agreed to its terms.

RETENTION OF POSSESSION OF PERSONAL PROPERTY AFTER SALE by vendor raises a rebuttable presumption of fraud, but is not fraud in itself.

REPLEVIN WILL LIE IN ALL CASES where the plaintiff has a present right to the possession of any personal property in the possession of the defendant.

REPLEVIN. Appeal from the circuit court of Maury county. The facts are stated in the opinion.

Payne, for the plaintiff in error.

M. S. Frierson, for the defendant in error.

By Court, CARUTHERS, J. This action of replevin was brought for a brown mare, worth sixty dollars. The mare was sold by one Holcomb, to the plaintiff, but left with the vendor for the use of his family. Some time after, Holcomb procured an auctioneer to sell the mare for him, and she was bought by Tate, who sold her to the defendant. It does not appear that the defendant had any knowledge of the purchase of the plaintiff.

The judge charged the jury: 1. That a sale of this kind of property is good, even without delivery of possession, against a subsequent purchaser without notice; and 2. "That an action of replevin will not lie unless there was a trespass committed in the taking of the property, where the action is brought for the seizure; or where brought for the detention, the detention must be wrongful or tortious, and under such circumstances as will make the holder a trespasser from the beginning. If the jury

shall find, from the proof, that the defendant came to the possession by purchase from one claiming the title and having the possession, and the same was delivered to him by virtue of his purchase, then the obtaining possession would not be a trespass on the part of the defendant so as to sustain the action of replevin; nor would his subsequent holding or detention make him a trespasser from the beginning, at the common law or under the statutes; and in that event, replevin would not be the proper action, but the plaintiff must resort to his action of trover or detinue."

The jury found for the defendant. From the judgment of the court, overruling a motion for a new trial, the plaintiff appealed to this court.

The argument here has been made upon the charge of the court on both points. We think his honor was right on the first proposition; that is, that a sale of personal property, other than slaves, complete in all its parts, where nothing more remains to be done by either party, passes the right to the property, without the possession being changed, against all the world. Though there are some authorities in conflict with this position, yet we consider the preponderance greatly in its favor: *Chit. Con.* 274, 275; *Willis v. Willis*, 6 *Dana*, 48; *Crawford v. Smith*, 7 *Id.* 59; *Wing v. Clark*, 24 *Me.* 366.

In *Potter v. Coward*, Meigs, 22, the same principle is stated in these words: "A sale of chattels is complete as soon as both parties have agreed as to the terms." The same rule applies to a contract of barter or exchange as to a sale for money. In these cases, the right to the possession, as well as the property, is perfect in the vendee, and any loss which may occur after that time, by death, or injury of the property, falls upon him. It is true that the retention of possession in such a case raises a rebuttable presumption of fraud, but is not fraud in itself. It merely throws upon the claimant, out of possession, the necessity of proving the transaction was fair in which his title originated: *Chit. Con.* 510, note 1; *Callen v. Thompson*, 3 *Yerg.* 475 [24 *Am. Dec.* 587]. So, upon this point, we think the law was correctly charged.

But on the second point we think his honor erred. It is true that at common law, and perhaps in some of our states, the action of replevin is confined to the cases designated by him; and we would, perhaps, concur in the propriety of so limiting it here, as a legislative question. But we are of the opinion that our act of 1846, c. 65, *Nich. Sup.*, 243, gives it

a broader range. By section 1 of this act, the action of replevin is given "when the goods or chattels of any person may be seized or detained by another, * * * in violation of the right of such person, * * * and against his will." In section 12 it is provided that where the property can not be found by the officer having the writ of replevin in his hands, but he returns that he has made known the contents of the writ to the defendant, the plaintiff may elect to declare against the defendant in trover, or detainer, and proceed to final judgment, without any other summons, and the suit shall be in every respect conducted as if the writ had been in either of those forms of action. Upon a fair construction of the whole of this act, and by it judging of the intention of the legislature, we are constrained to decide that it will lie in all cases where the plaintiff has a present right to the possession of any personal property in the possession of the defendant. In all such cases the property is unlawfully detained from the plaintiff by the defendant, and therefore falls within the plain language and meaning of the act. Whether it should be so or not, as a matter of sound policy, is a question for the legislature, and not for the courts; but in expounding the act, which is the extent of our power and duty, we can only regard the action of replevin as a substitute for the action of detinue, and that it is co-extensive in its application. We can easily see how the act might be very much abused, by changing the possession of property, upon groundless claims, during the pendency of protracted litigation; where, perhaps, the most proper and just course would be to leave the possession undisturbed, except in cases of violent and wrongful taking, by officers or others, until the right should be legally settled. But such are not the provisions of the act, as we understand them, and any alteration or amendment must come from the law-making power.

We therefore, for this error in the charge of the law, reverse the judgment of the court below, and remand the cause for a new trial, when the law will be charged as here declared.

SALE, WHEN PROPERTY PASSES.—Bargain struck and payment of the purchase money vests the property of a chattel in the vendee: *Pleasants v. Pendleton*, 18 Am. Dec. 726; *Williams v. Walton*, 29 Id. 122; *Jennings v. Flanagan*, 30 Id. 683.

RETENTION OF POSSESSION BY VENDOR after absolute sale is evidence of fraud, but may be explained: *Richmond v. Crudup*, 33 Am. Dec. 164; *Briggs v. Parkman*, 37 Id. 89; *Coke v. Chapman*, 44 Id. 536; *Fleming v. Townsend*, 50 Id. 318.

REPLEVIN, WHEN IT WILL LIE: See *Woods v. Nixon*, 1 Am. Dec. 364; *Badger v. Phinney*, 8 Id. 105; *Marshall v. Davis*, 19 Id. 468; *Snyder v. Vaux*, 21 Id. 466; *Baker v. Wheeler*, 24 Id. 66; *Allen v. Crary*, 25 Id. 566; *Crocker v. Mann*, 26 Id. 684; *Root v. French*, 28 Id. 482, and notes thereto.

THE PRINCIPAL CASE WAS AFFIRMED in *Dearmon v. Blackburn*, 1 Sneed, 392; *Wilson v. McQueen*, 1 Head, 18.

WYNNE'S LESSEE v. WYNNE.

[2 SWAN, 406.]

ALL ESTATE, RIGHT, OR INTEREST IN LANDS acquired by a testator after making his will, and of which he died seised or possessed, passes in like manner as if owned by him at the making of the will, if such appears to be his intention.

DEVISE, "I give to my much beloved wife, Micha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others;" *held*, that all the real property owned by the testator at his death, whether acquired prior or subsequently to the date of the will, passed to his wife.

RETROSPECTIVE LAWS ARE CONSTITUTIONAL when remedial in their nature, and which do not infringe upon or divest vested rights.

EJECTMENT. Appeal from the circuit court of Davidson county. The facts are stated in the opinion.

Meigs and Stokes, for the plaintiffs.

Trimble, F. B. Fogg, Caruthers, and E. H. Ewing, for the defendant.

By Court, Houston, Special J. This is an action of ejectment for two pieces of land in Davidson county, near the city of Nashville. The lessors of the plaintiff claim the land as the heirs at law of Albert H. Wynne, deceased, being his nephews and nieces; and the defendant, his widow, claims the land as devisee under his will. The will bears date the third of October, 1830, and the testator died in June, 1849. After his death, the will was found among his valuable papers, all in his own handwriting, signed by him, but unattested by witnesses. He had been married to his wife many years and had no children. At the date of the will, he had a large personal estate and but little real estate. He purchased the property in controversy after the year 1830, together with a large property real in Mississippi. The property sued for is the late residence of the testator and a lot adjoining it or near to it, and is worth eight or ten thousand dollars. The will is in few words, and after providing for the payment of his debts by the first clause, he declares, "Item

2. I give to my much beloved wife, Micha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others." He then appoints his wife sole executrix, unless she should wish some other person to join her, expressing a wish that no security be required of her, unless some other person should join her.

Several questions have been raised in the argument and elaborately discussed, but from the view we have taken of the case we deem it unnecessary to notice all the questions raised. The first section of the act of 1842, c. 169, prescribes the mode of descent, where any person shall die intestate, and having no issue or brothers or sisters, or issue of brothers or sisters. The second section provides that when an estate is vested by descent, it shall not be divested by the birth of a child; unless such child shall be born within ten calendar months next after the death of the intestate.

The third section provides that when any person to whom any estate shall be devised shall die before the death of the testator, leaving issue living at the testator's death, such devise shall not lapse, but shall vest in the issue of the deceased devisee.

The fourth section of the act is in these words: "That any estate, right, or interest in lands acquired by a testator, after making of his will, and of which he died seised or possessed as aforesaid, shall pass thereby in like manner as if owned by him at the making of the will, if such clearly appear by the will to have been the testator's intention."

The first question raised is, Doth this fourth section apply to wills made before its passage, when the testator lived until after its passage? In other words, does it apply to the will of Albert H. Wynne? It is well known that before the passage of this act land acquired after the making of a will did not pass thereby in this state, however clear the intention of the testator might be that it should so pass. The reason of this rule was, that a devise is in the nature of a conveyance or an appointment of a particular estate; and therefore lands purchased after the execution of the will did not pass by it: 4 Kent's Com. 510.

This was a stern and inflexible rule, in many cases operating hardly, by wholly defeating the clear and unequivocally expressed wish of the testator; and the object of the statute was to abolish this harsh rule and to permit testators to pass all their real estate by will, as well future acquisitions as lands

then owned, if such appeared to be the intention, placing the devise of real estate on a footing, as high as might be, with a will of personalty, to pass according to the apparent intent of the testator.

There is nothing in the language of the act restricting its operation to wills made after its passage. On the contrary, the terms of the act are general, and broad enough, it seems to us, to apply to all estates in lands acquired as well after as before the execution of the will. "Any estate, right, or interest in lands acquired by a testator after making of his will, and of which he died seised or possessed, as aforesaid, shall pass thereby," etc. This is comprehensive without a restriction, or seeming restriction, as to the date of the will. And the fifth section of the act would seem to strengthen this view of the question. It provides "that nothing herein contained shall be so construed as to operate upon or affect in any manner, or apply to the estate of any person or persons whatsoever who have died previous to the passage of this act." By excluding, in such express terms from the operation of the act the estates of persons who have died before its passage, the section very strongly indicates the intention of the legislature to include in the fourth section the estates of all persons who are living at the date of the passage of the act; and we are of opinion that such was the intention of the legislature, and that the fourth section does apply to Albert H. Wynne's will, and to the property in controversy. And we are the better satisfied with this view of the question by the fact that this act has received the same construction by the courts of Massachusetts. The fourth section of our act is identical with the act of Massachusetts upon the same subject, excepting the word "manifestly," which appears in the Massachusetts act, and not in ours. That act has been construed by the supreme judicial court of Massachusetts to apply to wills made before its passage as well as to wills made afterwards: *Cushing v. Aylwin*, 12 Met. 169; *Pray v. Waterston*, Id. 262.

It is true that the act of North Carolina upon the subject has received a different construction by the supreme court of that state. But it does not appear that the act of North Carolina contains any such provision as that contained in the fifth section of our act. And moreover, the terms of the North Carolina act, as the court there says, clearly make it operate prospectively only. They are, "that it shall be lawful for any testator," etc.; and "that the power hereby given shall extend," etc.: *Den d. Battle v. Speight*, 9 Ired. L. 288.

2. But it is further insisted that if the act of 1842, c. 169, sec. 4, in terms applies to wills made before its passage, and the legislature intended that it should so operate, it is inoperative and void, because in direct conflict with our declaration of rights, art. 1, sec. 20, which declares "that no retrospective law, or law impairing the obligation of contracts, shall be made." If this is true, then, of course, there is an end of the question, so far as the act of 1842 is concerned. It is true that taking the provision in its literal terms, the act of 1842, and all other legislation having in view past transactions, of whatever nature or character, would be in conflict with it. But taking it in its limited and restricted signification, as defined by our courts of justice, and there are many cases of retrospective legislation that are not prohibited. But is the act of 1842 one of the cases not prohibited by it? This section of the bill of rights has been so often directly and indirectly before the courts, and has received such a uniform legal construction, that we do not feel authorized, were we so inclined, to depart from it.

We understand that construction to be, that retrospective laws may be made where they do not impair the obligation of contracts or divest or impair vested rights. And hence, the legislature may make laws for the extenuation or mitigation of offenses; for repealing former laws; for the enforcement of contracts already made; or to make a paper, authenticated according to its directions, evidence, though not evidence before; laws affecting the authentication and solemnities of contracts; laws giving further time for the registration of deeds; laws validating deeds and the defective probate of deeds; laws providing for the payment of the officers and agents of the state for services already performed; laws providing new and additional remedies for a just right already in being; laws modifying or changing remedies, and all other strictly remedial laws; and there are many other laws that are retrospective, according to the letter, yet not prohibited by the bill of rights: 1 Meigs' Dig. 305, 306.

In the case of *Townsend v. Townsend*, Peck, 1 [14 Am. Dec. 722], speaking of the twentieth section of the bill of rights, the court says "that the whole clause and both sentences, taken together, mean that no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made."

In many other cases a retrospective law is defined to be a law infringing or divesting vested rights. A retrospective statute, affecting or changing vested rights, is generally considered in

this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations: 1 Kent's Com. 455.

We are satisfied with the principle above stated; for there are necessarily cases, almost without number, constantly arising under our system of government that require the passage of laws in reference to past transactions; not for the purpose of infringing rights, but to protect them from loss or injury; and we are not aware of any case in which it has been held that a retrospective law, simply because retrospective in terms, is unconstitutional and void; they have been so held, as connected with rights and obligations, where they affect or change vested rights, or impair the obligation of contracts.

It is true that it has been said, by high authority, that retrospective laws are generally unjust, and neither accord with sound legislation nor the fundamental principles of the social compact: Story on Const., sec. 1392. But this can not justly be predicated of such retrospective laws as are sanctioned by our courts. It may be said that to open the door to the passage of any retrospective laws is to open it to the passage of all such laws, and to an abuse of legislation on the subject; but this may be said of all legislation on any subject. Our courts are the judges of the powers of the legislature, and are open to correct the abuses of these powers, and to guard against unconstitutional legislation; and as we must necessarily have retrospective laws, and as many such are wise and proper, it is for the courts to judge whether rights are divested or contracts impaired by them, and so to declare the law.

Now, with this understanding of the meaning of the bill of rights, as above stated, what is the character of the act of 1842, c. 169, sec. 4? It can not be denied that it materially changes the character and effect of the will in question from what it would have had if the statute had not been passed.

Its construction is different from what it would otherwise have been. It could not have passed after-acquired real estate, but now it may. It could not have been available in the hands of defendant as evidence of her title to the property in controversy, but now it may be. But this is all that can be said of

the act of 1842; and is this sufficient? If this difference of character and effect produced a like difference or change of vested rights under it and by virtue of it, then we would say that it comes within the prohibition, and would be inoperative. But is this so? Is any contract impaired or right infringed or divested? It seems to us, most clearly, that such is not its effect. The law merely acts upon a paper which does not arise in contract, or vest rights or create obligations. It creates or establishes a new rule of law as to the paper and its subject-matter, to the injury of no person whatever. Although as to form the will was perfect in October, 1830, still it is ambulatory until the death of the testator; it is to be his will at his death, or not, as he may see proper to determine. It vests no rights. It imposes no obligation. It is virtually a blank until the death of the testator. It does not abridge his rights, but rather enlarges them. It enables him to do what before he could not do, however strong may have been his wish or intention, and however clear it might have appeared on the face of his will. We think the control of the whole subject of wills, and the transmission of property by will, is under the control of the legislature; and if the act had said that no estate, right, or interest in lands shall hereafter pass by will, would any of the land of Albert H. Wynne have passed to the defendant by virtue of his will? We can not conceive upon what principle it would have so done, under our decision on the subject of retrospective laws; and the principle is the same in the case supposed and in this case; and we think that the act of 1842, c. 169, sec. 4, is not in conflict with the twentieth section of the bill of rights.

3. But it is insisted that if the act of 1842 applies to this case, and is not inoperative and void, it does not clearly appear by the will to have been the testator's intention that his after-acquired real estate should pass thereby.

The testator says, "I give to my much beloved wife, Micha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others." Now, does it appear by this will that he intended to give to his wife his after-acquired real estate? It is not necessary that he should have made an express declaration in so many words that he so intended. It is sufficient if, taking the whole will together, such intention clearly or satisfactorily appears. There is a clear intention on the part of the testator not to die intestate as to any of his property, and an equally clear

intent that his wife should have all his estate; and not satisfied with an express declaration to this effect, and to make his intention, if possible, more manifest, he adds, that she is to have it "to the exclusion of all others," and we think that his intention to give his future as well as his present estate, reasonably and satisfactorily appears by the will. He could not have well used stronger language showing this intent, unless he had declared, in express terms, that all his estate owned at his death should go to his wife. And we are strengthened in our conclusion by the fact that it has been frequently so held by the supreme court of Massachusetts, upon similar words in a will, under their statute: *Cushing v. Aylwin*, 12 Met. 169; *Pray v. Waterson*, Id. 262; *Fay v. Fay*, 1 Cush. 93; *Winchester v. Forster*, 3 Id. 366.

In 1 Jarman on Wills, 285, it is laid down that, under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of his property to the full extent of his capacity; and accordingly such a gift, in regard to real estate, was read as a gift of the property belonging to the testator at the time of the execution of his will (he being incapable of devising any other), and as to personalty, as a disposition of what he might happen to possess at the period of his decease.

Thus we see the reason why a general bequest of personalty was considered as a bequest of all the property of that kind of which the testator might die possessed. It was so held, because by such general gift it was considered that such was the intention upon the face of the will; and there being no want of power, such intention would be carried out. He was considered as intending to dispose of such property to the full extent of his power. And so a general devise of real estate indicated the same intention; but not having power to devise after-acquired real estate by a general devise, it would not pass by such clause for that reason, and not because the intention so to devise did not appear by the will. The intention in each case, manifested by a general gift, was the same, and it could be carried out in one case, and in the other it could not. But now the statute comes and gives the testator power to devise after-acquired realty; and his intention, as manifested by a general gift, will be carried out.

From the view we have taken of the act of 1842, it will not be necessary to decide the questions as to whether publication and republication apply as to olographic wills; or, if they do,

whether there can be parol republication of such will; and if so, whether there was such republication in this case. And as the charge of the circuit judge does not materially vary from the view we have taken of the case, we affirm the judgment of the court below.

CONSTRUCTION OF WILL—WHETHER AFTER-ACQUIRED LANDS WILL PASS: See *Meads v. Sorsby*, 36 Am. Dec. 432; *Bruen v. Bragaw*, 38 Id. 519; *Beall v. Schley*, 41 Id. 415; *Doe d. Wynne v. Wynne*, 57 Id. 139; and *Girard v. Philadelphia*, 26 Id. 145.

RETROSPECTIVE ACT IS CONSTITUTIONAL if it neither take away a vested right of property, nor dissolve the obligation of a contract: *Aldridge v. Tusculum R. R. Co.*, 23 Am. Dec. 307; *Bleakney v. Farmers' etc. Bank*, 17 Id. 635; *Barnet v. Barnet*, 16 Id. 516, and notes to same.

THE PRINCIPAL CASE WAS FOLLOWED in *Collins v. E. T. & Va. R. R. Co.*, 9 Heisk. 847.

LOCKWOOD v. NYE.

[2 SWAN, 515.]

ESTATE IN REMAINDER, IN REAL OR PERSONAL ESTATE, is property, and is subject to attachment for the payment of debts.

PROCEEDINGS BEGUN IN SISTER STATE TO SUBJECT PROPERTY OF DEBTOR TO SALE to satisfy a debt will not act as a bar to action begun in Tennessee to enforce payment of the same debt.

ATTACHMENT. Appeal from the chancery court at Gallatin. The facts are stated in the opinion.

Guild, for the plaintiffs.

Baldrige and Head, for the defendants.

By Court, TOTTEN, J. This is an attachment bill in chancery at Gallatin, to subject an interest in remainder in land and slaves to the payment of a debt.

The plaintiffs reside in the state of New York, and on the 6th of May, 1842, in the circuit court of the United States at Jackson, Mississippi, they recovered a judgment for four thousand four hundred and eighty-six dollars and four cents against said Nathaniel and Daniel Nye. Execution was issued on this judgment, and returned *nulla bona*. On February 20, 1843, Daniel W. Nye was discharged in bankruptcy, and the validity of his discharge seems not to be contested. In 1848, the plaintiffs instituted a suit in the superior court of chancery, in the state of Mississippi, against said Nathaniel Nye and others. the object

of which was to discover and to subject assets fraudently concealed, to the satisfaction of said judgment. Pending that suit, the present one was instituted in chancery at Gallatin, in which it further appears that S. Nye died in 1850, leaving his last will and testament, by which he devised and bequeathed to his wife, Elizabeth, all his real and personal estate, "during her widowhood," and at her death or marriage, the same to be equally divided amongst his children named in the will, the said Nathaniel G. Nye being one of them. Elizabeth Nye is in possession of the estate under the will, and it being suggested that the slaves would probably be removed to the prejudice of this suit, the tenant for life is made a party, and an injunction was issued to restrain the removal of the slaves. Nathaniel G. Nye is a citizen of the state of Mississippi, and his interest in remainder under said will, and which is attached in the present proceeding, is estimated at some two thousand dollars. It is a joint interest with the other tenants in remainder claiming under the same will. The bill was dismissed by the chancellor, and the plaintiffs have appealed to this court.

1. The defendant Nathaniel G. Nye insists that his interest in remainder, in said property, is not liable to be attached and sold in satisfaction of said judgment, because an interest in remainder is not subject, under the law, to judicial sale for the payment of debts.

The act of 1836, c. 43, sec. 1, provides that "when any person or persons who are non-residents of this state have any real or personal property, of either a legal or equitable nature, or any choses in action, within this state," etc., it shall be lawful for a creditor, "without first having recovered a judgment at law," to file a bill in chancery to have said real or personal property, choses in action, and debts attached. This act applies expressly to non-resident as well as resident creditors. The act of 1838, c. 166, sec. 1, contains, in effect, the same provisions. It applies to a non-resident debtor, who "shall have property, debts, or other effects within this state," and makes the same liable to attachment in chancery for the payment of his debts. The words of the act of 1836 are, "any real, or personal property, of either a legal or equitable nature;" those of the act of 1838 are, "property, debts, or other effects."

Now, what is the nature of defendant's interest in the land and slaves attached? It is a vested remainder; it being a present, fixed right of future enjoyment at the termination of the estate of the tenant for life. "Vested remainders," says Mr.

Kent, "are actual estates, and may be conveyed by any of the conveyances operating by force of the statute of uses:" 4 Kent's Com. 205, 149. This applies, of course, to real estate; but it is equally true that a vested remainder in personal estate may be conveyed by deed or any informal writing; which will be instead of an actual delivery of possession. A remainder being an actual estate, it must be considered a property in the sense of the statute; as much so as the particular estate, for it is a fixed and present right to take effect in possession, after the particular estate is spent. The various interests, says Mr. Kent, into which an estate may be divided thus make, for many purposes, but one estate, being different parts or portions of the same entire inheritance: Id. 198. The one is as much property as the other; the difference consists only in the time of its enjoyment. We need hardly observe that the same rules apply in this respect to the personal estate: 2 Id. 352. It seems to us, therefore, that a vested remainder, in real or personal estate, is property, in the sense of the statute, and subject to be attached in chancery for the payment of debts.

The case of *Allen v. Scurry*, 1 Yerg. 36 [24 Am. Dec. 436], is not in conflict with the present judgment. In that case it was held that an interest in remainder, in a personal chattel, could not be sold under the writ of *fiери facias*, at the common law; because the officer could not take possession at the levy, nor deliver it at the sale; both of which are essential to a valid proceeding, under this writ, at the common law. It is true that Whyte, J., in delivering the opinion, places it also on another ground: the probable sacrifice of property, on account of the uncertainty as to the time when the estate might come into possession; but certainly the first is the true legal reason.

We may observe further, upon the doctrine of this case, which we are not disposed to disturb, that if there be no remedy at law to subject a debtor's estate held in remainder, for that reason, there should be a remedy in equity. For we can see no reason or justice in the proposition which maintains that the debtor shall hold his estate and the creditor go unsatisfied. We perceive no force in the argument that the estate might be sacrificed. This is not to be presumed; on the contrary, we are to presume that it will sell for its reasonable value, which can, in most cases, be easily ascertained. Besides, the argument will apply as well to every forced or judicial sale where property is sold to the highest bidder. Why may not the value of an interest in remainder be known and given as well at a forced as at a volun-

tary sale? A debtor may indeed vest his entire present funds in the purchase of a remainder; shall he be allowed to hold it to the prejudice of his creditor? We are satisfied, both upon reason and authority, that interests in remainder are subject to the payment of debts. We may add, that this view of the subject conforms, as we think, to the present policy of the law, which, after abolishing imprisonment for debt, evidently intends to subject every species of property to which the debtor has right to the payment of his debts. See act of 1832, c. 11.

2. In the next place, the counsel for the defendant insists that the plaintiffs ought not to be permitted to maintain the present suit, because the suit in chancery in the state of Mississippi, to obtain satisfaction of the same judgment, had been previously instituted, and was yet pending at the commencement of the present suit.

The suit in Mississippi has no reference to the property here in question, its object being to discover and subject such assets of the debtor as may be locally situated in that state; whether an amount sufficient to satisfy the judgment or any considerable part of it may be realized in that suit does not appear, nor can appear until its termination.

In the mean time we can see no legal or reasonable objection to the institution of the present suit, to obtain the further security of an attachment upon the debtor's property situated in this state, if the creditor have reason to believe the former suit to be of doubtful or contingent result.

It is a remedy to which he, as a creditor, is entitled under the statute; and we are not aware of any legal ground upon which we can repel him. Certainly he is entitled to but one satisfaction, and if he obtain it in the foreign suit, he will not be allowed to receive it here; but may, in that event, be subject to the costs of the present suit, especially if it appear that it was not probably necessary for his security.

The mere pending of a suit in a foreign court can not be pleaded in abatement, or in bar to a suit in our own state upon the same matter: *Mitchell v. Bunch*, 2 Paige, 620 [22 Am. Dec. 669]. And it is generally true that a court of chancery here, in the exercise of its injunctive power over the person of a party, has not any proper authority to restrain a suit previously instituted in the courts of another state or of the United States. Both comity and public policy forbid the exercise of such a power: *Mead v. Merritt*, Id. 404; *Diggs v. Wolcott*, 4 Cranch, 179.

We are satisfied that on both the questions relied upon the decree of the chancellor is erroneous.

The decree will be reversed and the cause remanded to be further proceeded in, in conformity to this opinion.

Judgment reversed.

VESTED ESTATE IN REMAINDER IS SUBJECT TO EXECUTION: See *Hyde v. Barney*, 44 Am. Dec. 335, and note to same, where prior cases appearing in this series are collected.

PENDENCY OF SUIT IN FOREIGN COURT or in a court of the United States, is not pleadable in abatement or in bar of a proceeding in a state court: *Mitchell v. Bunch*, 22 Am. Dec. 669; *West v. McConnell*, 25 Id. 191; *Lowry v. Hall*, 37 Id. 495.

THE PRINCIPAL CASE WAS FOLLOWED in *Perkins v. Clack*, 3 Head, 735, to the point that an estate in remainder in real or personal estate was property. So also in *Bank v. Nelson*, Id. 638; *Puryear v. Edmonson*, 4 Heisk. 58; *Pembaker v. Tomlinson*, 1 Tenn. Ch. 115.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

NOGEES v. NOGEES.

[7 TEXAS, 538.]

ACTS OF CRUELTY WITH SPECIFICATIONS AS TO TIME AND PLACE should be stated in petition for divorce on the ground of cruelty.

CONDONATION OF ACTS OF CRUELTY IS BAR TO DIVORCE only when there is no further ill treatment; but if there be fresh cruelty, the former acts will be revived, and the impediment raised by the reconciliation removed.

DIVORCE FOR ADULTERY IS BARRED BY CONDONATION UNDER TEXAS STATUTE, but this effect of reconciliation is not extended beyond causes for adultery.

RULES AND DOCTRINES OF ECCLESIASTICAL LAW RESPECTING DIVORCE MUST BE ENFORCED so far as they are applicable, and especially when their justice and good sense demand assent.

IT IS IMMATERIAL WHETHER OR NOT ACT BE UNLAWFUL that is charged by husband against wife and used as a pretext for cruelty; indeed, if the act were totally inoffensive in itself, so much the more flagrant would be the violence threatened or inflicted on account of such act.

CHARGE OF THEFT ACCOMPANIED WITH THREATS OF BODILY INJURY from which danger to life, limb, or health may be justly apprehended, justifies divorce on the ground of cruelty, though such criminatory charges are not in themselves sufficient.

THREAT ALLEGED IN PLEADINGS IN DIVORCE SUIT AS AGAINST LIFE may be inferred on appeal to have been at least a threat of bodily injury, though the statement of facts does not show its nature.

THREATS OF ONE WHOSE PREVIOUS ACTS HAVE ENDANGERED LIFE of threatened party, and have shown his temper to be brutal and ungovernable, justify the apprehension that the cruelties once inflicted may be repeated.

DIVORCE FOR CRUELTY MAY BE GRANTED when, from all the circumstances, it appears that one of the parties justly apprehends danger to life, limb, or health.

MERE BLOWS DO NOT NECESSARILY CONSTITUTE CRUELTY, for they may be unaccompanied with apprehension of danger to life, limb, or health, and may cause but slight unhappiness.

Suit for divorce by Queen Elizabeth Nogeess against Jacques Nogeess. The petition alleged that the plaintiff "had been often beaten and bruised by the defendant, until her life was thereby endangered; that the defendant had charged her with stealing his money, and threatened her life if she did not immediately return it, and drove her from his house." The statement of facts showed that about three years prior to the trial the defendant beat the plaintiff with a club about three feet in length and over an inch in diameter, that was used as a meat-stick, and injured her so as to endanger her life. They lived separately for some time thereafter, but afterwards lived together again. During this second cohabitation the defendant charged the plaintiff with stealing his money, and threatened her. She then again left his house. The court instructed the jury as stated in the opinion. The verdict was for the defendant, and the plaintiff appealed.

H. N. and M. M. Potter, for the appellant.

B. C. Franklin, for the appellee.

By Court, HEMPHILL, C. J. There was no demurrer to the petition; and as no question has been raised on the sufficiency of the pleadings, I will pass them over, with the single remark that they are objectionable on the ground of vagueness and uncertainty. The acts of cruelty, with specifications as to time, place, etc., should be stated, that the defendant may know what he is called upon to answer, and the court be apprised of the issues between the parties. The certainty required in pleadings in causes of this character, has been discussed in the case of *Wright v. Wright*, 3 Tex. 168, and to that it will suffice for the present to refer.

The only questions material to be considered arise on the alleged errors in the charge of the court.

And first, the jury are instructed that if they believed from the evidence that defendant beat plaintiff as charged, in consequence of which they separated, and they afterwards lived together, that such beating, before they separated and came together again, could form no ground for a divorce, and they must discard it from consideration in making a verdict.

This instruction is equivalent to the legal proposition that reconciliation between the parties is a perpetual bar to a divorce

for any precedent act of cruelty. This proposition was held in the case of *Wright v. Wright*, 6 Tex. 3, decided at the last term of this court, to be against law. Of this decision, the judge was, doubtless, not apprised; nor has it been referred to in the arguments of counsel. As the opinion in that case has not been published in book form, I will cite one or two paragraphs from it at length, viz.: "It is clear that the effect of renewed matrimonial cohabitation, on causes of divorce, arising from cruelty or outrages, has not been prescribed by statute; and we may with propriety recur to the doctrines of the common law, as received in the ecclesiastical courts in England, on the subject. Reconciliation in that law is technically termed condonation; and it does not constitute, under all circumstances, a perpetual bar against complaint for antecedent offenses. Condonation is defined to be a conditional forgiveness, that does not take away the right of complaint, in case of continuation of the injury, which operates as a revivor of former wrongs. By the ecclesiastical law, fresh acts of adultery or fresh acts of cruelty will revive former acts of adultery or cruelty. In *Westmeath v. Westmeath*, 4 Ecc. R. 290 [S. C., 2 Hagg. Ecc. R. Sup. 113], it is said that 'the force of condonation varies according to circumstances. The condonation, by a husband, of a wife's adultery, still more repeated reconciliations after repeated adulteries, create a bar of far greater effect than does a condonation, by a wife, of repeated acts of cruelty committed by a husband. In the former case, the husband shows himself not sufficiently sensible to his own dishonor, and to his wife's contamination; and reconciliations often repeated amount almost to a license to her future adultery, so as to form nearly an insuperable and immovable bar; but the forbearance of the wife, and her repeated forgiveness of personal injury, in hopes of softening the heart and temper of her husband, and under the feelings of a mother anxious to continue in the care and nurture of her children, are even praiseworthy, and create but a slight bar, removed by the reasonable apprehension of further violence.' See also 3 Ecc. R. 390; Shelford, 436, 445."

From these doctrines it appears that condonation operates a bar only where there is no further ill treatment—where the offending party discharges his duty according to the marriage obligations, or where the injured party is treated with that kindness and affection due to the conjugal relation. If there be fresh cruelty or outrage, the former acts will be revived and the impediment raised by the reconciliation removed.

It is scarcely necessary to say that by the statute, in suits for

divorce, brought for cause of adultery, if the injured party, having knowledge of the criminal fact, shall admit the guilty partner into conjugal society or embraces, such condonation will operate as a good defense and perpetual bar to the suit.

But this effect of reconciliation has not been extended beyond causes for adultery; and rules and doctrines of the ecclesiastical law, so far as they are applicable, and especially when their justice and good sense demand our assent, must be enforced.

There are other points growing out of this instruction, discussed in the case of *Wright v. Wright*, and to this case reference may be made. The charge in the latitude of its expression is erroneous. It would be consistent with law, only in the event that the causes of divorce were limited exclusively to offenses committed anterior to the reconciliation, there being no subsequent misconduct of a character to excite apprehension of bodily injury.

2. The jury were instructed by the judge that a charge, made by a husband against his wife, that she had stolen his money, they living together, is not a charge of larceny; that the wife, while living with the husband, can not commit larceny by taking his property.

Whether such be a charge of larceny or not, was but a mere incident of the primary subject of consideration for the jury, viz.: whether such charge, accompanied with the threat, constituted such an act of cruelty as to excite reasonable apprehension that the former outrages would be repeated, or that she would be subjected to great indignities, extending perhaps even to the danger of life. It is immaterial whose money was taken, whether that of the husband or of the wife. If the husband, from supposed rights of property in himself, or by virtue of that awful supremacy which, in his estimation, justified the use of the club to enforce domestic sway, deemed such taking to be disobedience to his sovereign authority, to be punished with blows and bruises, and even the loss of life, it is not material whether the offense charged was a violation of the laws of the land or not. This, it is true, might have aggravated the heinousness of the charge. But where the charge is made and used as a pretext for violence and outrage, it is not material what was the intrinsic character of the act. In fact, if the act were totally inoffensive in itself, if it formed no just ground of complaint, so much the more flagrant would be the outrage of violence threatened or inflicted on account of such act.

But was there no cruelty in the public accusation that the wife

had stolen his money? Did he not intend to blacken her character, destroy her reputation, inflict upon her lasting disgrace, and thus poison the sources of her happiness? There can be no doubt that his intention was to charge her with the crime of theft; and there can be as little doubt that such criminatory charges, although not sufficient in themselves to justify the disruption of the bonds of matrimony, yet in conjunction with other circumstances, they may constitute such ill treatment and outrage as to render living with the offender altogether insupportable.

But this charge does not stand alone. It is accompanied with a threat. The statement of facts does not show what the threat was. It is left to inference. The pleadings charge that he threatened her life; and in the defect of the statement as to what the threat was, we must infer that the proof sustained the allegation, or at least that it was a threat of bodily injury. Such threat, under the circumstances, might well inspire the plaintiff with apprehension and terror. She had been before exposed to the merciless inflictions of his club, or baton of authority. Her life had been previously endangered by the unbridled violence of his passions; and she might very well presume, and so might the court and jury, unless all the rules of induction and the lessons of experience be discarded, that the cruelties which had been once inflicted might again be repeated; and that the threats of one whose previous acts had shown his temper to be brutal and ungovernable, were not to be disregarded or viewed without alarm and apprehension.

The question of what acts will constitute cruelty, has been fully discussed in previous cases: *Sheffield v. Sheffield*, 3 Tex. 79; *Wright v. Wright*, Id. 168; *Wright v. Wright*, 6 Id. 3. There is great difficulty in defining legal cruelty. Its ordinary criterion is an apprehension of danger to life, limb, or health. If, from all the circumstances, it appears that one of the partners justly entertains such apprehensions, it becomes a case for the dissolution of the bonds of matrimony. The duties of self-preservation are paramount to those of marriage. The bond of nuptial happiness is converted into a yoke of wretchedness, and the statute authorizes and requires it to be broken and removed.

The questions in this case have been examined at length in causes previously decided, and I will not continue their discussion. As said before, no exact definition of legal cruelty can be given, for there may be cases in which mere blows should not be so considered. These may be given, but still there may be

strong affection in the party. Among persons of coarse habits they might pass for very little more than rudeness of language or manner. They might occasion no apprehension, and be productive of but slight unhappiness. The jurors have the parties before them, and can appreciate and place the proper estimate on their conduct, and its effect upon each other: and much is confided to their judgment and discretion. But where the life of one has been endangered by the deliberate outrage of the other, and this is again threatened, we must disregard all presumptions before we can infer that such threats bode no danger, and constitute no foundation for dread and apprehension.

The judgment is ordered to be reversed, and the cause remanded for a new trial.

Judgment reversed.

CRUELTY AS GROUND FOR DIVORCE: See *Payne v. Payne*, 40 Am. Dec. 660, and note to *Poor v. Poor*, 29 Id. 674-679; *Lockridge v. Lockridge*, 28 Id. 52; *Harratt v. Harratt*, 26 Id. 730; *Helms v. Franciscus*, 20 Id. 402; *Rhame v. Rhame*, 16 Id. 597.

CONDONATION OF ADULTERY, DECREE OF DIVORCE WILL NOT BE OPENED to allow defendant to prove, though the decree was obtained while he was confined in the state prison: *Hofmire v. Hofmire*, 32 Am. Dec. 611.

CONDONATION OF ADULTERY IS BAR TO DIVORCE ON THAT GROUND: *Smith v. Smith*, 27 Am. Dec. 75.

CONDONATION IS CONDITIONAL FORGIVENESS, and a repetition of the offense revives the condoned adultery: *Smith v. Smith*, 27 Am. Dec. 75.

CONDONATION OF CRUELTY IS DEPENDENT UPON FUTURE GOOD USAGE and conjugal kindness. The principal case is cited to this effect in *Farnham v. Farnham*, 73 Ill. 500.

PARTITION FOR DIVORCE ON GROUND OF ADULTERY ought to state time and place of its commission: *Christianberry v. Christianberry*, 25 Am. Dec. 96.

McKINNEY v. JONES.

[7 TEXAS, 598.]

NOTICE OF MOTION TO QUASH LEVY AND RETURN OF EXECUTION must be given to the purchaser at the sale, and to the plaintiff in execution.

APPEARANCE OF PARTY ENTITLED TO NOTICE, AFTER JUDGMENT, merely to give notice of appeal, is not such an appearance as will dispense with the necessity of notice.

DEFENDANT IN EXECUTION HAVING STATED, IN MOTION TO QUASH SHERIFF'S RETURN, the fact of the sale and the name of the purchaser, is estopped from contending that no notice of the motion to the purchaser was necessary, on the ground that the return of the sale not having been signed by the sheriff the court could not know that there was a purchaser to be affected by the judgment.

MOTION by the appellee to quash a levy and return on an execution issued on a judgment of the appellant against him. The return of the levy was signed by the officer, but the return of the sale, stating the land levied on to have been sold to H. L. Kinney, was not signed. The motion to quash stated that the land "was sold to H. L. Kinney, as appears by the return thereon." No notice of the motion was given to the purchaser or to the plaintiff in execution. The court below rendered judgment quashing the levy and return, and notice of appeal was given by the plaintiff's counsel.

R. Hughes, for the appellant.

W. Alexander, for the appellee.

By Court, WHEELER, J. The ground mainly relied on for a reversal of the judgment is the want of notice to the purchaser under the execution. We have heretofore decided that such notice is necessary: *Toler v. Ayres*, 1 Tex. 398. Such also has been held to be the law on a similar state of case elsewhere. *Jewitt v. Marshall*, 3 A. K. Marsh. 153.

It would seem, on general principles, that the plaintiff in execution ought also to have had notice. The appearance of a party, entitled to notice after judgment, merely to give notice of appeal, has been held not such an appearance as will dispense with the necessity of notice: *Jewitt v. Marshall*, *supra*. This proceeding appears to have been conducted to final judgment *ex parte*, and without notice to any one. This, it is conceived, was irregular and erroneous.

Unless notice were required, the return of process might be quashed for defects which might have been cured by amendment, had an opportunity been afforded by notice to the party in interest.

It is objected by the appellee, that the return of the sale not having been signed by the sheriff, the court can not know that there was a purchaser to be affected by the judgment. This is answered by the motion to quash, in which the fact of a sale and the name of the purchaser are stated.

The judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed.

GIVING NOTICE OF APPEAL TO SUPREME COURT does not operate as appearance of parties to a motion in which notice was necessary. The principal case is cited to this effect in *De Witt v. Monroe*, 20 Tex. 293. In *Woolford*

v. *Dugan*, 35 Am. Dec. 52, it is held that the defendant appearing to prosecute a writ of error must, on reversal of the judgment, be regarded as though he had been served with the original writ, and must therefore appear and answer. In general, notice is necessary to give the court jurisdiction of the person: *Cheatham, Ex parte*, 44 Id. 525, and note citing prior cases.

GRIFFIN v. CHUBB.

[7 TEXAS, 603.]

QUESTION DECIDED WITHOUT ARGUMENT IS OPEN TO CONSIDERATION.

EVIDENCE THAT DEFENDANT IN ACTION FOR MALICIOUS PROSECUTION acted under the advice of counsel, obtained in good faith, upon information of the real facts of the case, is admissible under the general issue for the purpose of rebutting evidence of malice.

PLAINTIFF MUST ALLEGE WANT OF PROBABLE CAUSE AND MALICE in action for malicious prosecution. A general denial puts these averments in issue. The burden of proof is upon the plaintiff; and under the general denial the defendant may introduce evidence of any facts in direct rebuttal of evidence introduced by the plaintiff without specially pleading them.

DEFENDANT CAN NOT BE REQUIRED TO PLEAD SPECIALLY facts which amount to no more than a denial of the plaintiff's averments; or facts which it will only become material for the defendant to prove for the purpose of rebutting evidence introduced by the plaintiff; or that which is but evidence of a material, issuable fact.

AS BETWEEN PARTIES, ACTUAL DELIVERY IS NOT ESSENTIAL TO VALIDITY OF SALE.

SALE IS COMPLETE UPON COMPLETION OF CONTRACT, and right of property and of possession vest in the purchaser upon payment of the price and delivery of a bill of sale, without actual delivery of the property.

VALIDITY OF SALE IS NOT AFFECTED AS BETWEEN PARTIES by possession remaining with the vendor, if it be consistent with the terms of the contract.

SALE IS VOID FOR FRAUD, IF VENDOR WAS INDUCED TO MAKE SALE by misrepresentations made to him by the purchaser in respect to material facts peculiarly within his knowledge, by which the seller was deceived to his injury.

PLAINTIFF MUST PROVE BOTH WANT OF PROBABLE CAUSE AND MALICE to maintain an action for malicious prosecution.

ACQUITTAL DOES NOT RAISE PRESUMPTION OF WANT OF PROBABLE CAUSE in an action for malicious prosecution.

MALICE IS NOT LEGAL PRESUMPTION OR NECESSARY INFERENCE from want of probable cause in an action for malicious prosecution.

MALICE MAY BE INFERRED FROM WANT OF PROBABLE CAUSE in an action for malicious prosecution when there are no circumstances to rebut the presumption that malice alone could have suggested the prosecution; and it may be inferred where the defendant's conduct will admit of no other interpretation, except by presuming gross ignorance.

WANT OF PROBABLE CAUSE CAN NOT BE INFERRED FROM MOST EXPRESS MALICE.

ACTION for malicious prosecution by the appellee against the appellant. The plaintiff had been arrested, tried, and acquitted by a jury upon a charge preferred by the defendant that the plaintiff had stolen from him a negro named Ned. The answer was a general denial. It was proved at the trial that the plaintiff had been prosecuted and acquitted as alleged, and that at the trial the witnesses for the prosecution were the defendant and another. It further appeared that before the prosecution the defendant had sold the slave to Thomas Chubb, the plaintiff's brother, who paid for the negro at the time of the sale with a note on one Johnson. By the terms of the agreement the defendant was to retain possession of the negro Ned for one month, and at the end of that time to deliver him to the purchaser; and he agreed to pay hire for the slave for the month during which he retained him. At the expiration of the month the defendant refused to deliver the slave to the purchaser. Thomas Chubb, the purchaser, and the plaintiff then decoyed and carried him away. And this act was the basis of the prosecution which is the subject-matter of this action. Testimony was introduced of representations made at the time of the contract by Thomas Chubb to the defendant, to the effect that no difficulty would be experienced in the collection of the note given in payment for the slave, and of the discovery by the defendant of difficulties in its collection before the end of the month when the slave was to be delivered. The defendant offered to show that before beginning the prosecution of the plaintiff he had taken advice of counsel. The plaintiff's objection to this evidence was sustained. The jury were instructed that "if the sale was consummated by the indorsement and delivery of the note by Thomas Chubb and the execution and delivery of the bill of sale, the right of property and of immediate possession was vested in Chubb, unless by agreement the vendor was to retain possession; and then at the end of the time stipulated Chubb had the right to demand or peaceably take possession." The court also charged that: "1. Want of probable cause and malice must be proved by the plaintiff to sustain his action; and a verdict of not guilty and discharge of the defendant from prosecution raises the presumption that there was no probable cause. 2. If there be no probable cause, the law presumes malice in the prosecutor; and it is incumbent on the person who may originate the prosecution and pursue the accused so as to place himself in the situation of a prosecutor, to show, by evidence produced on the trial, that there was probable

cause." The verdict was for the plaintiff. A motion for a new trial was overruled, and judgment was rendered for the plaintiff. The defendant appealed.

W. C. Abbott, for the appellant.

H. N. and M. M. Potter, for the appellee.

By Court, *WHEELER, J.* The questions presented by the record, which it is deemed material to consider, relate to the rulings of the court: 1. Upon the admissibility of evidence; 2. In instructions to the jury.

In support of the ruling of the court, refusing to permit the defendant to prove that before instituting the prosecution he took the advice of counsel, we are referred to the opinion of this court in the case of *Collard v. Gay*, 1 Tex. 494. In that case it did not appear that the opinion of counsel was taken upon a true, or indeed any, statement of facts. The question was whether it was competent for the defendant to prove that, before commencing the prosecution, he had taken the advice of an attorney. It was not proposed to prove that the advice had been given upon information of the facts; and the court held that the evidence was not admissible. No briefs were furnished or authorities cited by counsel; nor was the case argued at the bar. The question whether evidence that the defendant had acted under the advice of counsel, given upon information of the facts, was admissible to repel the imputation of malice, does not appear to have been distinctly presented or considered; and we do not think the decision ought, under the circumstances, to be held to have concluded that question. If an authority were necessary, we have that of the supreme court of the United States, for holding a question, decided without argument, open for consideration: *Decatur v. Paulding*, 14 Pet. 607, and cases cited.

"The defendant," says Starkie, "may give in evidence any facts which show that he had probable cause for prosecuting, and that he acted *bona fide* upon that ground of suspicion. It is no answer to the action," he adds, "that the defendant acted upon the opinion of counsel if the statement of facts upon which the opinion was founded was incorrect, or the opinion itself unwarranted:" 2 Stark. Ev., 5th Am. ed., 495. But the inference deducible from this extract is, that if the statement of facts on which the opinion of counsel was founded be correct, that the defendant acted upon it, may be a defense to the action. Accordingly, in further treating of the subject, he says: "It is com-

petent to the defendant, for the purpose of rebutting the inference of malice, to show that he acted upon professional advice, although it was unfounded in law:" Id. 499.

Mr. Greenleaf, in his treatise on the law of evidence, says: "How far the advice of counsel may go to establish the fact of probable cause for prosecution, is a point upon which there has been some diversity of opinion. It is agreed that if a full and correct statement of the case has been submitted to legal counsel, the advice thereupon given furnishes sufficient probable cause for proceeding accordingly. But whether the party's omission to state to his counsel a fact, well known, but honestly supposed not to be material, or his omission through ignorance to state a material fact which actually existed, will render the advice of counsel unavailable to him as evidence of probable cause, does not appear to have been expressly decided. The rule, however, as recognized in a recent American case, seems broad enough to protect any party acting in good faith and without gross negligence. For it is laid down that if the party 'did not withhold any information from his counsel, with the intent to procure an opinion that might operate to shelter and protect him against a suit, but on the contrary, if he, being doubtful of his legal rights, consulted learned counsel with a view to ascertain them, and afterwards pursued the course pointed out by his legal adviser, he is not liable to this action, notwithstanding his counsel may have mistaken the law:'" *Stone v. Swift*, 4 Pick. 393 [16 Am. Dec. 349]; 2 Greenl. Ev., sec. 459. It is remarked, however, that in this case no question was made whether any material fact had been omitted: Id., note.

Mr. Phillips, in his treatise, referring to authorities also referred to by Mr. Starkie and Professor Greenleaf, thus states the rule: "It is competent for the defendant to show that he acted *bona fide* upon the opinion of a professional adviser, although it may be erroneous, provided it has been given upon a full and correct statement of facts:" 3 Phill. Ev., 3d ed., 262.

The law was thus stated by Chief Justice Shaw in *Wills v. Noyes*, 12 Pick. 327, 328: "Such advice, given upon a case truly stated, and the advice honestly pursued, though incorrect, will rebut such presumption, and constitute a good protection for the client. But even legal advice, if used only as a cover, and not acted upon in good faith—if it does not induce an honest belief that the party has probable cause, will not screen him from the consequences of prosecuting an entirely ground-

less suit." It was the opinion of Mr. Justice Story, in *Blunt v. Little*, 3 Mason, 102, that it is a necessary qualification of the admission of such evidence "that it should appear in proof that the opinion of counsel is fairly asked upon the real facts and not upon statements which conceal the truth or misrepresent the cause of action:" *Id.* 105. It was also his opinion, expressed in that case, that evidence that the defendant acted under the advice of counsel, given upon a deliberate examination of the facts, is admissible for the purpose of repelling the imputation of malice and establishing probable cause: *Id.*

Such, indeed, appears to be the well-settled law. In order to show that, in originating the prosecution, he was not actuated by malice, the defendant must be permitted to prove that he took the opinion of counsel whether the facts of the case would support a prosecution. Evidence that he acted under such advice, fairly obtained, upon information of the real facts of the case, is certainly admissible. On this question there does not appear ever to have been any diversity of opinion. The admission of such evidence, with the qualification expressed in the extract we have given from the opinion of Mr. Justice Story, can not, it is conceived, operate an injustice to the plaintiff, while it appears to be a just, if not even a necessary, protection to the defendant, dictated alike by considerations of public policy and justice to individuals.

It is, however, insisted on behalf of the appellee, that the evidence was rightly excluded in the present case, for the reason that it was not admissible under the general denial, and for the further reason that it does not appear that the defendant proposed to prove that the advice of counsel was taken upon the information of the facts.

It is incumbent on the plaintiff in this action to allege the want of probable cause and malice. The denial of these averments puts in issue the existence of the facts. It further devolves on the plaintiff to prove the truth of his averments. And when the issue has been thus formed, and the proofs adduced by the plaintiff, which conduce to establish the issue on his side, no reason is perceived why the defendant may not maintain his side of the issue, by the proof of any facts which go to rebut or repel the evidence introduced by the plaintiff, without specially pleading them. In principle, there can be no reason for requiring the defendant to plead specially facts which amount to no more than the denial of the plaintiff's averments, or facts which it will only become material for the

defendant to prove, for the purpose of rebutting or repelling the evidence introduced by the plaintiff. The burden of proof was with the plaintiff, under the issue; and it was, we think, competent for the defendant, under the general denial, to introduce any rebutting evidence, or evidence which went directly to disprove the plaintiff's averments. Where it is proposed to disprove the plaintiff's case, by proving independent facts, from which the conclusion adverse to the plaintiff is to be deduced inferentially, it may, in general, be necessary for the defendant to plead specially such independent facts. He can not, however, on general principles, be required to plead that which is but evidence of a material, issuable fact.

It is difficult to lay down general rules which will be susceptible of convenient and certain application in each case. And there would be less difficulty in determining upon the admissibility of the evidence in this case had the defendant pleaded specially. We are of opinion, however, that under the general denial any evidence was admissible which was competent to prove probable cause and to repel the imputation of malice; and consequently, that the evidence in question was admissible for that purpose, though not made the subject of special plea. It does not appear from the bill of exceptions on what ground the court rejected the evidence. It may have been upon the ground that it was not proposed to prove that the advice of counsel was obtained upon information of the facts. But from the manner in which the point is presented in the record, it appears probable that it was upon the broader ground that such evidence was in no case admissible. If so, the ruling was erroneous.

It will, however, suffice to have stated the general principles of the law applicable to this subject for the direction of the parties in the future conduct of the cause, without dwelling to inquire whether the court made a right application of them in this case; as, in the view we entertain of other questions in the case, the decision of this is not necessary to its disposition.

It remains to consider the instructions to the jury.

In respect to what would be a valid contract of sale, to pass the right of property and possession to the purchaser, the instructions given were substantially correct. As between the parties, actual delivery is not essential to the validity of a sale. Upon the completion of the contract the sale is complete; and the right of property and of possession vest in the purchaser, upon payment of the price and delivery of a bill of sale. Nor will it affect the validity of the sale, as between the parties, that the

possession remains with the vendor, if it be consistent with the terms of the contract.

The contract, however, may be void for fraud; as if the vendor was induced to make the sale by misrepresentations made to him by the purchaser in respect of material facts peculiarly within his knowledge, by which the seller was deceived to his injury. In that case the title would not pass to the purchaser.

In respect to probable cause and malice, the instructions assert, in effect, these propositions: 1. That want of probable cause and malice must be proved by the plaintiff; 2. That a verdict of not guilty, and the discharge of the defendant from prosecution, raises the presumption of the want of probable cause; and 3. That the want of probable cause raises the presumption of malice.

If these several propositions were correct, it would only be necessary for the plaintiff to prove his acquittal of the charge on which he had been prosecuted. That would be sufficient to make out his case. The rest would be supplied by legal presumptions.

The instructions afford an instance of the *petitio principii*. The first is unquestionably correct; but neither of the others, it is conceived, is so. Professor Greenleaf, with his characteristic succinctness and accuracy, thus states what the plaintiff must prove to maintain this action:

“To maintain an action for this injury, the plaintiff must prove: 1. That he has been prosecuted by the defendant, either criminally or in a civil suit, and that the prosecution is at an end; 2. That it was instituted maliciously and without probable cause; 3. That he has thereby sustained damage:” 2 Greenl. Ev., sec. 449.

“The plaintiff must show that the prosecution was instituted maliciously, and without probable cause; and both these must concur. If it were malicious and unfounded, but there was probable cause for the prosecution, this action can not be maintained. The question of malice is for the jury; and to sustain this averment, the charge must be shown to have been willfully false. In a legal sense, any unlawful act, done willfully and purposely to the injury of another, is, as against that person, malicious. * * * The proof of malice need not be direct; it may be inferred from circumstances; but it is not to be inferred from the mere fact of the plaintiff's acquittal for the want of the prosecutor's appearance when called:” 2 Greenl. Ev., sec. 453.

“The want of probable cause is a material averment, and though negative in its form and character, it must be proved by the plaintiff, by some affirmative evidence; unless the defendant dispenses with this proof by pleading singly the truth of the facts involved in the prosecution. It is independent of malicious motive, and can not be inferred, as a necessary consequence, from any degree of malice which may be shown:” 2 Greenl. Ev., sec. 454.

“The discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary. But in ordinary cases it will not be sufficient to show that the plaintiff was acquitted of an indictment by reason of the non-appearance of the defendant, who was the prosecutor; nor that the defendant, after instituting a prosecution, did not proceed with it; nor that the grand jury returned the bill ‘not found:’” 2 Greenl. Ev., sec. 455; 2 Stark. Ev., 494; 3 Phill. Ev., 256, and cases cited.

To maintain the action, therefore, it was incumbent on the plaintiff to prove both the want of probable cause and malice. Neither alone is in general sufficient: 2 Stark. Ev., 5th Am. ed., 492, note 2. Though there was no probable cause, yet if the defendant was not actuated by malice, but acted under an honest belief that there was probable cause for instituting the prosecution, after having taken proper and reasonable precaution to obtain accurate information on the subject as to the law and facts, he can not be made liable in this action.

The defendant’s acquittal did not raise the presumption of the want of probable cause; nor did the law presume malice from the want of probable cause. Malice may be inferred from the want of probable cause, where there are no circumstances to rebut the presumption that malice alone could have suggested the prosecution; and it may be inferred where the defendant’s conduct will admit of no other interpretation, except by presuming gross ignorance: 3 Phill. Ev. 257. In the language of Chief Justice Shaw, in a case before cited: “The groundlessness of the prosecution may, in many instances, be so obvious and palpable, that the existence of malice may be inferred from it:” *Wills v. Noyes*, 12 Pick. 326. But malice is in no case a legal presumption, or to be inferred as a necessary consequence of the want of probable cause.

“I have always understood,” said Parke, J., in *Mitchell v. Jenkins*, 5 Barn. & Adol. 588, 594, “that no point of law was

more clearly settled than that, in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declarations, viz., that the prosecution or arrest was malicious, and without probable cause; if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question, in all cases, for their consideration."

In refusing the instruction asked by the defendant, the court, in effect, ruled that the jury were "bound," that is, obliged to find the prosecution malicious, if they believed it to have been without probable cause. Whereas the law is, that neither is the want of probable cause to be inferred, as a necessary consequence, from the most express malice: 3 Phill. Ev. 256; nor is malice to be inferred, as a necessary consequence, from the clearest proof of the want of probable cause.

Because, therefore, the court erred in the instructions to the jury, the judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed.

BETWEEN PARTIES ACTUAL DELIVERY IS NOT ESSENTIAL TO VALIDITY OF SALE: *Danley v. Rector*, 50 Am. Dec. 242, and note citing prior cases. And see prior cases there cited on the effect of the retention of possession of personalty by the vendor after the sale. But the sale is not complete while anything remains to be done, such as identification of the articles sold: *Golder v. Ogden*, 53 Id. 618, and note citing other cases. See also *Williams v. Allen*, 51 Id. 709; *Sahlman v. Mills*, Id. 630; note to *Shindler v. Houston*, 49 Id. 336; *Hooban v. Bidwell*, 47 Id. 386.

DELIVERY OF BILL OF SALE VESTS TITLE TO PROPERTY IN PURCHASER: *Cocke v. Chapman*, 44 Am. Dec. 536; *Begley v. Morgan*, 35 Id. 188.

SALE INDUCED BY FRAUDULENT MISREPRESENTATIONS OF PURCHASER may be treated as void: *Hoffman v. Noble*, 39 Am. Dec. 711, and note citing prior cases. See also *Hodgeden v. Hubbard*, 46 Id. 167.

WANT OF PROBABLE CAUSE AND MALICE necessary to sustain action for malicious prosecution: See *Kline v. Shuler*, 49 Am. Dec. 402, and note citing prior cases; *Grant v. Deuel*, 38 Id. 228; *Williams v. Van Meter*, 41 Id. 644, and notes; *Yocum v. Polly*, 36 Id. 583. The principal case is cited to this point in *McNuse v. Herring*, 8 Tex. 152; *Gabel v. Weisensee*, 49 Id. 138.

ACQUITTAL IS EVIDENCE OF WANT OF PROBABLE CAUSE, but is not sufficient alone: *Grant v. Deuel*, 38 Am. Dec. 228; *Williams v. Van Meter*, 41 Id. 644, and notes citing prior cases.

MALICE MAY BE INFERRED FROM WANT OF PROBABLE CAUSE: *Williams v. Van Meter*, 41 Am. Dec. 644; *Yocum v. Polly*, 36 Id. 583; *Grant v. Deuel*, 38 Id. 228. But discharge by *nolle prosequi* is not *prima facie* evidence to that effect: *Yocum v. Polly*, 36 Id. 583.

WANT OF PROBABLE CAUSE CAN NOT BE INFERRED FROM MALICE: *Yocum v.*

Polly, 36 Am. Dec. 583; *Grant v. Deuel*, 38 Id. 228; *Williams v. Van Meter*, 41 Id. 644. But slight evidence of it will be sufficient: *Id.*

ALLEGATION OF WANT OF MALICE AND PROBABLE CAUSE IS NECESSARY: *Yocum v. Polly*, 36 Am. Dec. 583.

THE PRINCIPAL CASE IS CITED in *Cuney v. Dupree*, 21 Tex. 218, to the point that where it is proposed to disprove the plaintiff's case by proving independent facts from which the conclusion adverse to the plaintiff is to be deduced inferentially, generally it is necessary to plead such independent facts specially.

KIRKLAND v. RANDON.

[8 TEXAS, 10.]

CONTRACT TO FORFEIT CERTAIN AMOUNT IN CASE OF FAILURE TO RUN HORSE-RACE is a valid contract, and an action may be maintained upon a note given for such amount.

ERROR to Fort Bend. The action was upon a promissory note. The defendant pleaded that the consideration for which the note was given was void, it being for the amount of a forfeit on failure to run a horse-race. Judgment was rendered for the defendant. The other facts appear from the opinion.

N. H. Munger, for the plaintiff in error.

Alexander and Atchison, for the defendants in error.

By Court, HEMPHILL, C. J. From the testimony it appears that there was no trick, unfairness, or fraud, on the part of the plaintiff or the payee in the inception of this contract, or in any of the acts upon which, by its terms, the liability of the defendants on the note was to arise. The proceedings on the race-track and the delivery of the note were all done in conformity with the customary rules and regulations on the subject of racing.

Unless the consideration of the note was illegal and void, the defendants were clearly liable on their undertaking. We have decided in several cases that wagers on horse-races were recoverable at common law, and as they were not prohibited by statute in this state, an action upon them was maintainable. Wagers on horse-races may be regarded, not only as indifferent wagers upon indifferent matters, and therefore not obnoxious to the law; but their exclusion from the general class of gaming contracts may be placed, and I presume is by the legislature, on the ground that they tend to stimulate and encourage an improvement in the breed and qualities of the horse. That such is the fact, the history of this animal in England and the United

States would doubtless abundantly prove. But, be the policy which supports the validity of such wagers what it may, it must equally extend to and sustain all contracts which are but subsidiary and incident to the wagers themselves. The contract for forfeiture is based upon the loss of time, and charges, and expenses necessarily incurred in preparations for the race; and we see no good reason for sustaining the contract for the wager, and rejecting that for the forfeiture; and it is ordered, adjudged, and decreed that the judgment be reversed, and the cause remanded for further proceedings.

Judgment reversed.

WAGERS ON HORSE-RACES ARE NOT ILLEGAL IN TEXAS, and may be recovered in an action at law: *Dunman v. Strother*, 46 Am. Dec. 97, and see note to that case, page 99, where other cases are collected: *Pierce v. Randolph*, 12 Tex. 295; *Armstrong v. Parchman*, 42 Id. 186, both citing the principal case.

CONTRACT TO PAY FORFEIT IN CASE OF FAILURE TO RUN HORSE-RACE is binding: *Campbell v. Reeves*, 14 Tex. 10, citing the principal case.

PORTIS v. PARKER.

[8 TEXAS, 23.]

SHERIFF MUST TAKE ACTUAL POSSESSION OF PERSONAL PROPERTY in order to constitute a valid levy thereon, and the act of taking possession must be of such a character as would make the officer, if not protected by the process, liable for the trespass.

ACT OF SHERIFF IN ASSERTION OF HIS RIGHT TO PERSONAL PROPERTY, levied on by him, must be open and notorious, and such as would be susceptible of proof if called in question.

WHERE SHERIFF'S RETURN STATES THAT HE LEVIED ON PROPERTY of a certain man, and that a married woman bearing the same surname claimed it as her separate property, and gave bond to try her right, it will be presumed that she was the wife of the defendant in execution.

EXECUTION OF DELIVERY BOND BY WIFE OF EXECUTION DEBTOR will estop him from denying that there was a levy, or that it was of such a character as would have deprived himself and wife of the possession had the bond not been given, where the husband and wife are living together at the time of the making of the levy.

TAKING OF DELIVERY BOND PRECLUDES SHERIFF FROM CONTESTING the fact of seizure, when sued for a trespass to the property.

WHAT CONSTITUTES VALID LEVY OF WILD CATTLE, *quære*.

WHERE EXECUTION COMMENCED "THE STATE OF TEXAS, COUNTY OF AUSTIN," and the process had performed its functions, the execution will not be quashed for defect or error in the style of it, although had objection been made *in limine* it might have been quashed or amended.

ERROR from Austin. Motion to quash the levy and return on an execution on the grounds: 1. That the execution was not styled according to law; 2. That no valid levy was made by taking possession of the property. The execution commenced as follows: "The state of Texas, county of Austin. To the sheriff of said county. Greeting," etc. The sheriff's return stated that he had levied upon four hundred and fifty head of cattle, more or less, as they ran, branded in part with a gudgeon, and in part "R. & C.," and known as the Portis & Cummins' stock; and also upon one large old road-wagon; and that all the property was claimed by Rebecca Portis as her separate property, and that bond was given by her to try the right.

N. Holland, for the plaintiff in error.

N. H. Munger and J. B. Jones, for the defendant in error.

By Court, **HEMPHILL**, C. J. The objection to this return is, that it nowhere shows an actual seizure of the property, or the performance of any such act, by way of asserting title, as would have subjected the sheriff to an action for the trespass, were he not protected by the process. In the case of *Bryan v. Bridge*, 6 Tex. 137, we held, at the last term, that an actual possession of personal property was essential to the validity of the levy; and that the act of taking possession must be of such character as would make the officer, if not protected by the process, liable for the trespass. The mode in which a levy on personal property must be made is not indicated in the statute regulating executions; but there are various provisions relative to the responsibility, etc., of the sheriff, for the production of the property levied upon, which must be predicated upon the fact of previous seizure and possession. The defendant in execution (Dig., art. 1330) is authorized to retain possession of slaves and personal property levied upon, on giving bond and security for its delivery; and by article 1334, it is made the duty of the sheriff to securely keep all property levied upon by him, for which no delivery bond is given; and he is made responsible for any losses and damages resulting from his negligence. The sheriff is not, in express terms, required to take actual possession of the property; but this is implied as to all property of which possession can be taken; otherwise, how is the sheriff to keep it securely, so as to have it forthcoming in satisfaction of the judgment? The act of possession must be according to the nature of the property. If it be of goods, for instance, they should be brought within his view, and be sub-

ject to his control; and he may take an inventory of them, or perform some open and unequivocal act in assertion of his title, which would operate to disturb and divest the possession of the defendant.

His act, in the assertion of his right to the property, must be open and notorious; and such as would be susceptible of proof, if called in question. If secret levies, and claims to property without possession or control, were tolerated, the rights of parties interested would be greatly embarrassed, and third parties, without the means of knowledge of such claims, might be made the victims of their ignorance: *Westervelt v. Pinckney*, 14 Wend. 123 [28 Am. Dec. 516]; *Beekman v. Lansing*, 3 Id. 450 [20 Am. Dec. 707]; *McKircher v. Hawley*, 16 Johns. 288; *Banks v. Evans*, 10 Smed. & M. 35 [48 Am. Dec. 734].

Let us examine now the character of this levy, as presented in the return and in the record.

The cattle, it is stated by the sheriff, were levied upon as they run; and the return continues to state, in effect, that all the property mentioned in the above levy was claimed by Rebecca Portis, who made the usual oath, and bond with sureties for the forthcoming of the property, and the payment of all damages that may be awarded against her, in case she failed to establish her right. The return does not show that the cattle were herded or taken possession of in any way; nor does it explicitly state whether he had a view or control of the property; nor is there any proof as to the notoriety of the acts and declarations of the sheriff at the time of making the levy; nor is there any evidence tending to show, on the other hand, that the levy was secret, that the sheriff made no declarations, or performed no acts indicating his intention to levy upon and seize the property.

But what are the circumstances as they appear on the record? It appears that immediately upon the levy Mrs. Rebecca Portis asserted her claim to the property as a portion of her separate estate; and the presumption is, from such claim, though it is nowhere stated, that she was the wife of the defendant, and that the property was claimed as her own, in contradistinction to the separate right of the husband or of the community. Now it will be admitted, that if a delivery bond had been given by the defendant himself, it would operate as an estoppel, and conclude him from denying that there was no levy. There may be cases of extortion of bonds, *colore officii*, by which the right of denying the levy by the defendant would not be compromised;

but generally he must be estopped by his own acts; and the plaintiff in execution could not complain, as he would have additional security that his claim would be finally satisfied.

Now, is there any difference in point of fact, so far as the knowledge and the rights of the defendant are affected, between the execution of a delivery bond by himself and one by his wife, that the property shall be returned to the sheriff, provided her claim be not established? The presumption is that husband and wife live together; the property is by law under his control; and that he is apprised of the acts of his wife in relation to such property; and consequently, of the acts and declarations of the sheriff, in seizing, possessing, or taking control of the property, and which were the inducement to the assertion of the claim by the wife. She would, of course, look to him for advice and assistance in support of her rights, although in cases of this character the courts would be bound to vigilance in protecting the property of the wife from the open assaults of the husband's creditors, and the secret connivance of the husband himself. But ordinarily, where the parties live together, and the wife, upon levy, asserts her claim to the property, and gives assurances for its delivery, he could not deny knowledge of such levy, or that it was of such character as would have deprived himself and wife of the possession, had a bond not been given for its return to the sheriff on failure to establish her right. It may be admitted that the return of the sheriff, if the claim had been interposed by some third party, would have been insufficient without amendment, and without proof *aliunde* of facts establishing the notoriety of the levy, and a disturbance of the possession of the defendant; but under all the circumstances indicated by the return in this case, we deem the levy sufficient, and that its validity can not be disputed by the defendant. If the sheriff were sued for a trespass to the property, he could not contest the fact of seizure. The taking of the bond would preclude him from denying that he had such possession as justified him, on its surrender, to demand a bond for the return of the property. If the defendant himself, to preserve possession, had been compelled to execute a delivery bond, he might have shown such fact in proof of the trespass; and if his wife, living with him, had been obliged, for the protection of her own rights, and to prevent the abstraction and possible loss of such property, to execute a return bond, such fact would also be evidence of seizure by the sheriff.

It is difficult to prescribe any special mode for a levy upon

wild cattle. A levy must combine notoriety with such seizure as would enable the sheriff to control and keep in safety the property. At the same time, the possession must be according to the nature of the property; and the act of the sheriff should not subject the defendant to any unnecessary expenses to be incurred for its preservation. If wild cattle were penned and fed until the day of sale, the expenses would consume a great portion of the property. If herdsmen were employed to guard them, the charges would be onerous on the defendant. It may be said that the latter can always avoid such expense, by giving bond for delivery. This might not always be convenient, and in many cases would be oppressive. As the subject of a proper rule in such cases has not been discussed by counsel, I will waive further remarks.

As the argument has extended to the validity of the execution, though no prayer is made that it be quashed, I will barely say that the objection to the style of the process, where this has performed its functions, and the rights of parties depend on its validity, can not be sustained. The terms employed here may be treated either as a style or as a caption. No caption, no venue in fact, is necessary. The addition of the name of the county may be rejected as surplusage, and "the state of Texas" would then stand alone, and give character and style to the process. Had the objection been taken to the process *in limine*, it might have been quashed or amended; and such would be the better practice. The style, as such, gives authority to the officer; and it should not be coupled with additions which, if not rejected, would reduce it to a mere description of the place whence the process emanated. We are of opinion that there was no error in the judgment; and it is ordered that the same be affirmed.

Judgment affirmed.

NECESSITY OF TAKING POSSESSION ON LEVY BY SHERIFF: See *Princeton Bank v. Crozier*, 53 Am. Dec. 254, note 258, where other cases are collected. To constitute a valid levy, the sheriff must have taken possession of the goods in some way: *Converse v. McKee*, 14 Tex. 30, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Cook v. Sparks*, 47 Tex. 33, to the point that a motion to set aside a levy for a merely formal defect in the return will not be entertained; and in *Miller v. Clements*, 54 Id. 355, to the point that a replevy bond is a statutory judgment upon which execution may issue.

ROGERS v. WATROUS.

[8 TEXAS, 62.]

REPEALS BY IMPLICATION ARE NOT FAVORED IN LAW; but a subsequent statute, revising the subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied. And though a subsequent statute be not repugnant in its provisions to a former one, yet if it was clearly intended to prescribe the only rules which should govern, it repeals the prior statute.

ACT OF 1843, PROVIDING FOR CHANGE OF VENUE in cases where the judge was interested, is repealed by the act of 1846.

DISTRICT COURT CAN NOT IN GENERAL REVISE ITS OWN JUDGMENT of a former term, but when an interlocutory order has been inadvertently or erroneously made, which, after judgment on appeal, may occasion a reversal of the judgment, it may before final judgment correct such erroneous order, if susceptible of being corrected without prejudice to the rights of the parties.

WHERE CHANGE OF VENUE HAS BEEN IMPROPERLY ORDERED, the court to which the transfer was made may direct it to be retransferred to the court where it belongs.

ERROR from Galveston. The facts are stated in the opinion.

Alexander and Alchison, for the plaintiff in error.

R. Hughes, for the defendant in error.

By Court, **WHEELER, J.** The change of venue was awarded under the provision of an act of the congress of the republic, passed in 1843 (Hart. Dig., art. 637), which provides "that hereafter it shall be the duty of any one of the district judges of the republic of Texas to change the venue upon the motion of any practicing attorney, in any case in which said judge may be interested, from the county in which he may be presiding to the nearest adjoining county out of his district."

Was this statute in force at the time of the awarding of the change of venue?

The constitution of the state, art. 7, sec. 14, directs that "the legislature shall provide for a change of venue in civil and criminal cases."

The act of 1846, sec. 14 (Hart. Dig., art. 653), provides that "the district courts may order a change of venue for the trial of any suit, civil or criminal, under the rules and regulations prescribed by law." The next succeeding section of the same act provides that "when any judge of the district court may be interested in any causes pending in his district," etc., "or

when the judge has been of counsel in the causes, he may exchange districts with any judge who is not subject to like disabilities," etc. And by section 16 it is provided that "when any judge is disqualified, the parties may, by consent, choose and appoint some other person to try the cause," etc.: Hart. Dig., art. 653-655.

The provision of the constitution which we have cited evidently contemplates a revision by the legislature of the law upon the subject of change of venue. The provisions of the statute referred to contain such revision as respects cases in which the judge is interested or has been of counsel; and they seem to have been intended to provide for that entire subject-matter, and to supersede all former laws on the same subject. The law does not favor repeals by implication. But a subsequent statute, revising the subject-matter of a former one, and evidently intended as a substitute for it; although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied: *Commonwealth v. Cromley*, 1 Ashm. 179.

So, though a subsequent statute be not repugnant in its provisions to a former one, yet if it was clearly intended to prescribe the only rules which should govern, it repeals the prior statute: *Daviess v. Fairbairn*, 3 How. 636.

Applying these rules of construction to the present case, we entertain no doubt that the act of 1843 was repealed by the provisions of the act of 1846. It follows that the change of venue was unauthorized. Whether void for the want of authority in the judge to grant it, or only erroneous as having been granted for an insufficient cause, the court at Galveston was justified in striking the case from its docket. It is true that the district court can not, in general, revise its own judgments of a former term. But where an interlocutory order has been inadvertently and erroneously made, which, after judgment on appeal, may occasion a reversal of the judgment, there can be no reason why the district court should not correct such erroneous order, if susceptible of being corrected without prejudice to the rights of parties, before final judgment, so as to preserve legality in its proceedings and render its final judgments irreversible.

The district court of Galveston county might, in our opinion, have gone even further, and directed the case to be retransferred to the county of Harris, where it belongs. And the only hesitancy we have in giving it that direction is, that it was removed from that county at the instance of the plaintiff in error.

The rights of both parties, however, may be jeopardized by the removal, if the case be not restored to its place in the proper county. It is clear that they ought to have an opportunity afforded of having their rights finally adjudicated; and that if deprived of that opportunity, it would be in consequence of an error in which the defendant in error is not implicated.

The case presents a novel aspect. But we may, we think, without transcending our authority as an appellate court, direct that the cause be remanded to the district court of Harris county, to be reinstated upon the docket of that court, and for further proceedings, at the costs of the plaintiff in error.

Ordered accordingly.

REPEALS BY IMPLICATION ARE NOT FAVORED: See *Neill & Keese*, 51 Am. Dec. 746; *Dugan v. Gittings*, 43 Id. 306, note 320.

THOUGH SUBSEQUENT STATUTE BE NOT REPUGNANT TO FORMER ONE, yet if it was clearly intended to prescribe the only rule which should govern, it repeals the prior statute: *Cain v. State*, 20 Tex. 364; *Ex parte Valasquez*, 28 Id. 179; *Tunstall v. Wormley*, 54 Id. 481; *Pierpont v. Crouch*, 10 Cal. 316, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Gillespie v. Redmond*, 13 Tex. 15, to the point that a court has power to reinstate upon the calendar a case which had been improperly dismissed; and in *Shaw v. Cade*, 54 Id. 312, to the point that orders changing the venue without authority are nullities.

BURKE v. CRUGER.

[8 TEXAS, 66.]

PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT PARTIES WHO SIGNED SPECIALITY as principals were in fact sureties only.

MERE INDULGENCE TO DEBTOR DOES NOT DISCHARGE SURETIES unless there is an agreement upon a sufficient consideration, and binding upon the creditor, to give time to the principal debtor.

TAKING COLLATERAL SECURITY, THOUGH OF HIGHER NATURE, FROM PRINCIPAL DEBTOR, or a stranger, does not preclude the principal debtor from suing on the first contract, and consequently does not discharge the sureties upon it.

MORTGAGE IS MERE COLLATERAL SECURITY FOR PAYMENT OF DEBT, and the taking of a mortgage does not operate as an extinguishment of the debt, or as a suspension of the remedy, unless there is an express agreement to that effect.

APPEAL from Harris. The appellees sued the appellants jointly with A. J. McGown on a contract under seal, which provided that Cruger & Moore should print a religious newspaper to contain matter to be furnished by McGown, "editor and pro-

prietor," in consideration of which McGown, Burke, Bailey, and Bagley were to pay said Cruger & Moore nine hundred dollars a year, in quarterly payments. The contract was signed on the twenty-ninth of May, 1847, by all the parties as principals. The defense relied on by Burke, Bailey, and Bagley was that they executed the contract as sureties for McGown, and that the plaintiffs, knowing this, had, without their knowledge or consent, given an extension of the time of payment to McGown. McGown made no defense. On the trial, the other defendants offered to prove that they were but sureties to McGown in the contract, and they also offered in evidence a mortgage upon land, given by McGown to the plaintiffs to secure the payment of said sum, and containing a power to sell in case of the non-payment of the sum intended to be secured. This evidence was excluded by the court, on the ground that having executed the contract as principals, it was not competent for the defendants to prove that they were sureties for the purpose of letting in the defense that the plaintiffs had, by giving time to the principal, released them from their obligation. Verdict for the plaintiffs.

E. A. Palmer, for the appellants.

C. H. Sabin, for the appellees.

By Court, *WHELAN*, J. The principal inquiry is, whether parol evidence was admissible to prove that the defendants, who pleaded to the action, executed the contract as sureties; and if so, whether the evidence offered conduced to prove that the plaintiffs had given an extension of time to the principal, by which the sureties were discharged from their undertaking.

Whatever diversity of opinion there may have been upon the question whether a party who has signed a joint and several bond or other specialty with another can at law, and as against the obligee, aver and prove that he was but surety, where he appears as principal upon the instrument, that he may do so in equity appears to be well settled: 2 *Phill. Ev.*, 3d ed., 863, note 429, and cases cited.

In a court of equity parol evidence is always admissible to prove the relationship subsisting between the joint contractors, whatever the form of the instrument; for equity does not regard the form of the instrument. "I take the principle to be," said *Johnson, J.*, in giving the opinion of the court in *Smith v. Tunno*, 1 *McCord Ch.* 481 [16 *Am. Dec.* 617], "that the relationship which subsists between the joint obligors is a matter wholly ex-

trinsic of the written contract, and may, therefore, be proved by parol, without any violation of the rule which prohibits the introduction of parol evidence to contradict or vary a written agreement."

It is immaterial what may be the form of the instrument, whether a simple contract in writing or a specialty, and though all appear upon the instrument as principals, in equity parol evidence is admissible to prove that one or more of the joint makers or co-obligers signed the instrument in the character of surety. "In equity, parol evidence is admissible to show who is principal and who surety:" Burge on Suretyship, 1st Am. ed., 212; *Smith v. Doak*, 3 Tex. 215.

It is also perfectly well settled, that "if the creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal by enlarging the credit beyond the period mentioned in the contract, the surety is discharged, both in equity and at law:" *United States v. Hillegas*, 8 Wash. C. C. 75.

The law on this subject is thus stated by Mr. Justice Nelson, in *Gahn v. Niemcewicz*, 11 Wend. 312: "The principle is well established, that giving time by a valid and binding agreement, by the creditor to the debtor, without the assent of the surety, operates to discharge him, both at law and in equity. The reason of the principle is, that the contract between the parties is varied, and the risks of the surety enhanced," etc.: Id. 317. "The doctrine is," said Chancellor Kent, in *Ring v. Baldwin*, 2 Johns. Ch. 559, "that the surety is bound by the terms of his contract; and if the creditor, by agreement with the principal debtor, without the concurrence of the surety, varies these terms by enlarging the time of performance, the surety is discharged; for he is injured, and his risk is increased." And even though it be shown that the extension of time has worked no injury to the surety, the effect upon his liability is the same: *Gahn v. Niemcewicz*, *supra*. It is the settled doctrine, both at law and in equity, that a surety is not to be held liable beyond the precise terms of his contract. The creditor has no right to increase his risk without his consent; and can not, therefore, vary the original contract; for that might vary the risk: *Ludlow v. Simond*, 2 Cai. Cas. 57 [2 Am. Dec. 291]; *Reynolds v. Ward*, 5 Wend. 503.

It clearly was the right of the defendants to prove, by parol or other evidence, that they were but sureties, and McGown the principal debtor; and that the plaintiffs, knowing this, by

a valid agreement, gave to the latter, without their assent, an extension of time beyond that stipulated in their contract.

The only question of difficulty in the case is, whether the evidence offered, if admitted, would have established an agreement to give time, obligatory upon the plaintiffs, and by which their right of action upon this contract was suspended. If so, and the defendants can prove that they were sureties, they were thereby discharged. But if there was not such an agreement, the mere giving of time would not operate to discharge the sureties.

In *Ring v. Baldwin*, before cited, Chancellor Kent said: "The established doctrine is, that mere delay in calling on the principal will not discharge the surety, provided that delay be unaccompanied with any settled or binding contract for that purpose." "All the cases of relief of surety have gone upon the ground that time was given to the principal, by contract, without consent of the surety:" *Id.*

In *Reynolds v. Ward*, 5 Wend. 504, the court said: "The principle to be extracted from the case is, that the creditor can not vary the terms of the contract so as to increase the risk of the surety without discharging him; but the terms are not varied by mere indulgence. To discharge the surety, it would seem to be necessary that there should be some agreement by which the plaintiff's right to prosecute and enforce the fulfillment of the contract is suspended."

What is the giving of time within the meaning of the rule is thus explained by Chief Justice Gibbs in *Orme v. Young*, Holt N. P. 84, cited in *Fulton v. Matthews*, 15 Johns. 435, note a [8 Am. Dec. 261]. He said: "What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining, not exacting the money at the time; but it is the act of the creditor, depriving himself of the power of suing, by something obligatory, which prevents the surety from coming into a court of equity for relief; because the principal having tied his own hands, the surety can not release them."

The authorities seem fully to have established the doctrine that there must be an agreement, upon a sufficient consideration, and binding upon the creditor, to give time, in order to discharge the surety, unless some other circumstance than a mere indulgence to the debtor be shown: *Fulton v. Matthews*, 15 Johns. 433 [8 Am. Dec. 261]; *Pain v. Packard*, 13 Id. 174 [7 Am. Dec. 369]; *Payne v. Commercial Bank*, 6 Smed. & M. 24; *Mont-*

gomery v. Dillingham, 3 Id. 647; *Coman v. State*, 4 Blackf. 241; *Harter v. Moore*, 5 Id. 367; *Hunt v. United States*, 1 Gall. 32.

The question in the present case is, whether there was any giving of time, by the plaintiffs, within the sense and meaning of this exposition of the rule; or whether there was any agreement by them to give time, in consideration of the additional security.

If there was, it evidently was not observed by the plaintiffs. On the contrary, they acted as if no such agreement existed; for they brought suit long before the period had elapsed to which, it is alleged, the time was extended.

If the giving of the mortgage by McGown was merely voluntary, for the better security of his creditors, and not in consideration of any promise or agreement, on their part, to give an extension of time on the debt due upon this contract; or if it was given upon some other or different consideration, it could not operate to discharge the defendants of their undertaking as his sureties.

In the case of *Gahn v. Niemcewicz*, 11 Wend. 320, before cited, Mr. Justice Nelson said: "It is well settled, that merely taking a new security from the debtor, without agreeing to give time, will not discharge the surety." The learned judge cited several cases in which it had been held that the taking of mere collateral security did not amount to giving time, or release the surety upon the original contract; and adds: "The time when the new security becomes due does not vary the effect and operation of it upon the old, as abundantly appears from the above cases. All of them became due, or could not be enforced until some time after they were taken; but this circumstance implied no agreement to postpone the remedy upon the old security. These cases all turned upon the point that no agreement had been made to forbear, in consideration of the new security, at the time it was received; and that the mere receipt of it did not imply one." Id. 321, 322.

The taking a collateral security, though of a higher nature, whether from the principal debtor or a stranger, does not preclude the creditor from suing upon the first contract, and consequently does not discharge the sureties upon it. If the original debt is not merged or extinguished by such higher security, but remains unsatisfied, it operates no discharge of the surety. *Day v. Leal*, 14 Johns. 404. A mortgage is not a satisfaction, but is a security for the payment of a debt. *Stampers v. Johnson*, 8 Tex. 6, and authorities cited. It does not merge all

extinguish the original debt, but is a merely collateral security: *Id.*

The taking of the mortgage in this case, therefore, did not operate as an extinguishment of the debt, or, it would seem, as a suspension of the remedy, unless there was an express agreement to that effect: *Gahn v. Niemcewicz, supra.* "In order to discharge a surety, in consequence of the variation of a contract, or a deprivation of his equitable rights and remedies, not only the fact of suretyship must exist, but it must be known to the creditors at the time of the act complained of. If the fact appears on the face of the security, that is enough; if not, the knowledge of it must be brought home to the creditors, by the surety, clearly and satisfactorily; because, as all parties appear upon the instrument as principals, it is deceptive, and calculated to mislead. The surety, therefore, should be holden to strict proof:" *Id.*

The principle involved in the present inquiry is important, not only in its influence upon the rights of the parties in the present case, but as matter of law for the government of future cases; and as all the evidence proposed on this subject was excluded, we deem it proper to abstain from the expression of any decided opinion as to the effect of the evidence offered, had it been admitted. If the court had not excluded the evidence proposed, there would perhaps have been other evidence introduced by the parties, which would have placed the whole transaction in a clear point of view before the court and jury, and would have relieved the questions in the case from the embarrassment which now attends their investigation. When the case shall have been remanded, the opportunity will be afforded to the parties to introduce all the evidence in their possession going to show the real facts of the case, both in respect to the alleged suretyship of the defendants and the extension of time. The court will then be enabled to apply the law to the ascertained facts of the case, and it will suffice for the present to have extracted from the authorities the general principles applicable to the subject.

The defendant McGown not having appealed, and standing in the undisputed character of a principal debtor, we see no reason for disturbing the judgment as to him.

But because the court erred in excluding the evidence offered by the other defendants, the judgment as to them is reversed, and the case remanded for further proceedings. Judgment reversed.

MERE DELAY ON PART OF CREDITOR TO SUE PRINCIPAL does not discharge the surety: *Carter v. Jones*, 49 Am. Dec. 425, note 428, where cases are collected. But where the creditor enters into a distinct agreement with the principal debtor for an extension of the time of payment, the surety is thereby discharged: *Pilgrim v. Dykes*, 24 Tex. 384, citing the principal case. See also note to *King v. State Bank*, 47 Am. Dec. 743, where other cases are collected.

GIVING TIME TO PRINCIPAL DEBTOR WITHOUT BINDING CONTRACT to do so does not discharge the surety: *Cruger v. Burke*, 11 Tex. 696; *Hunter v. Clarke*, 28 Id. 162; *Yeary v. Smith*, 45 Id. 72; *Frois v. Mayfield*, 33 Id. 807, all citing the principal case. The contract to extend the time must be on a valid consideration, in order to affect the sureties: *Claiborne v. Birge*, 42 Id. 102; *Williams v. Covillaud*, 10 Cal. 426, both citing the principal case. See also note to *Carter v. Jones*, 49 Am. Dec. 428, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Roberts v. Bane*, 32 Tex. 388, to the point that the giving of a deed of trust does not extend the time.

DEAN v. DUFFIELD.

[8 TEXAS, 235.]

ALLEGATION THAT CLAIM AGAINST ESTATE, DULY AUTHENTICATED, WAS PRESENTED to the administrator for allowance and was by him rejected, is sufficient. There is no necessity to aver specially the making of the affidavit required by the statute. The affidavit constitutes no part of the cause of action.

JOINT ADMINISTRATORS ARE REGARDED IN LAW AS ONE PERSON, and therefore a suit may be maintained on a claim duly presented to and rejected by one only of several administrators.

DISMISSAL OF ACTION AS TO ONE OF TWO JOINT AND SEVERAL MAKERS of a promissory note does not preclude the plaintiff from prosecuting the suit against the other.

APPEAL from San Augustine. The appellant brought suit against the appellees on a joint and several promissory note made by the defendant Duffield and the intestate Horton. The petition alleged the presentation of the claim, duly authenticated, to one of the administrators, who refused to allow it. The demurrer of the administrators was sustained, and the plaintiff appealed.

J. M. Ardrey, for the appellant.

O. M. Roberts, for the appellees.

By Court, WHEELER, J. It does not appear by the record on what ground the demurrer to the petition was sustained. The objections now urged to its sufficiency are, that it does not sufficiently appear that the claim was properly authenticated when presented to the administrator for allowance; that suit does not

appear to have been brought within three months from the date of the rejection of the claim; and that the claim is alleged to have been presented to and rejected by one only of the joint administrators.

The averment of the presentation of the claim to the administrator was sufficient. There was no necessity to aver specially the making of the affidavit required by the statute. The affidavit constituted no part of the cause of action, and it was not necessary, therefore, that it should be set out or described in the petition.

Taking the averments of the petition, as for the purpose of considering their legal sufficiency on demurrer, they are to be taken as true, the suit appears to have been brought in time.

The remaining objection is not tenable. Though it was formerly held otherwise, it seems to be now the settled law that joint administrators stand on the same footing, and are invested with the same authority in respect to the administration of the estate, as co-executors. Like them, they are regarded in law as one person; and consequently, the acts of one of them, in respect to the administration, are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property: *Toll. Executors*, 4th Am. ed., 407; *Murray v. Blatchford*, 1 Wend. 583 [19 Am. Dec. 537]; *Gage v. Johnson*, 1 McCord L. 492.

If the joint or concurrent action of all were necessary to render their acts valid, the allowance of the claim by the other administrator would have been equally ineffectual as its rejection by the one to whom it was presented; and unless both should concur, the party would be without a remedy.

The objections to the petition are not well taken. But had it been otherwise, and had the suit not been maintainable as against the administrators of Horton, that afforded no ground for dismissing it as to his co-defendant Duffield. It was their joint and several promissory note, and the dismissal as to one of the makers did not preclude the plaintiff from his right to prosecute the suit to judgment against the other: *Austin v. Jordan*, 5 Tex. 130. We are of opinion that the judgment be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

CLAIMS AGAINST ESTATES OF DECEDENTS: See *Cole v. Robertson*, 55 Am. Dec. 784, note 790.

THE PRINCIPAL CASE IS CITED in *Horton v. Wheeler*, 17 Tex. 55, to the point that plaintiffs may dismiss as to one of defendants served with process,

and proceed to judgment against his co-defendants; and in *Willis v. Farley*, 24 Cal. 500, to the point that joint administrators are considered in law as one person.

HUSTON v. CURL.

[8 TEXAS, 239.]

PROPERTY PURCHASED DURING MARRIAGE IS PRESUMED TO BELONG TO COMMUNITY, whether the conveyance be made to the husband or wife separately, or to them jointly. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife; in which case, it remains the separate property of the party whose money was employed in the acquisition.

PROCEEDS OF SALE OF PROPERTY DEVISED TO WIFE ARE HER SEPARATE PROPERTY.

APPEAL from San Augustine. The opinion states the case.

Henderson and Jones, for the appellant.

O. M. Roberts, for the appellee.

By Court, HEMPHILL, C. J. The appellee, Thomas J. Curl, having recovered judgment against Alamazon Huston and James Perkins, execution was issued and levied upon a negro woman named Amy, as the property of the said Alamazon Huston. The wife of the said Alamazon, viz., Elizabeth Huston, the appellant, claimed the said slave as her separate property, and filed the affidavit and bond required by the statute, establishing the method of trying the right of property levied on under execution, etc.: Art. 2814. Her claim to the property is distinctly (in the affidavit and bond) placed on the ground that the said slave is her own property, separate and apart from that of her husband. An issue was, in accordance with the statute, directed to be framed. The plaintiff Curl's averment is not very intelligible, or precisely descriptive of the right under which the defendant in execution (the said Alamazon) holds and owns the said property. It is alleged, however, that the said slave is subject to the said execution, and that she was levied upon as his (the said defendant's) property, and in the joint possession of himself and wife. The claimant, the said Elizabeth, in response, denies that the woman is the property of A. Huston; avers that she is and was at the time of the levy her own property, and as such held separate and apart from her husband. On the trial the jury found the property to belong to the com-

munity, and subject to the execution. The claimant moved for a new trial, which was overruled, and she appealed.

It appeared in the progress of the trial that the said Alamazon and Elizabeth had been known as man and wife for the last fifteen years; that the said slave was purchased in December, 1848, and the bill of sale taken in the name of the said Elizabeth Huston. There was evidence that one of the witnesses had, for several years prior to the purchase of said slave, had money to loan out at interest for the said Elizabeth, and which was claimed by her as her separate funds, amounting, at the time of the purchase, to the sum of four hundred dollars; that the price of the woman was four hundred and fifty dollars; and that this was partly paid by a post-office draft for four hundred and forty dollars, purchased by the said Elizabeth, and by ten dollars advanced by her; but there was no evidence as to the source from which she derived the said sum of four hundred dollars, so claimed by her in her separate right.

The judge charged that if said slave was purchased by said Elizabeth during her marriage, the presumption was that the purchase was made with the common funds of the husband and wife; but if the jury were satisfied that the money paid was the result of the sale of property devised to her, then the slave was her separate property, and not subject to the said execution; and that the presumption, in the absence of proof to the contrary, was that the debt for the payment of which the slave was levied upon was a community debt.

The propositions embraced in this charge, with the exception of the last, were not disputed by the counsel for the appellant, and it seems that this last, which was the subject of discussion, is immaterial to and extrinsic of the issue between the parties. The only question to be determined upon the issue was, whether the property belonged to the said Elizabeth in her separate right or not. If she failed to establish the affirmative of this issue, her claim as urged by her was defective, and could interpose no bar to the operation of the execution. No question is presented by the issue as to whether the execution could be rightfully levied upon community property or not. Her interest in the property, as a part of the common stock, is not the foundation of her claim. It is based upon her sole, separate, and exclusive right, and to this the inquiry is confined; and if her right as set up be not sustained, the controversy is at an end, and judgment must necessarily be entered against the claimant. An inquiry as to the possibility of the property being exempt,

on other grounds, from the execution, is not authorized; and whether the charge of the court be right or wrong, on this extraneous inquiry, the verdict can not be affected, provided it be sustained on grounds otherwise sufficient.

There is no error in the propositions contained in the first two charges. It is the settled doctrine and law, that property purchased during the marriage, whether the conveyance be made to the husband or wife separately, or to them jointly, is presumed to belong to the community. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife, in which case it remains the separate property of the party whose money was employed in the acquisition: *Scott v. Maynard*, Dallah, 548; *McIntyre v. Chappell*, 4 Tex. 187; *Love v. Robertson*, 7 Id. 6 [56 Am. Dec. 41].

The claimant having failed to prove that the purchase of the slave was made with her separate funds, we are of opinion that there was no error in the judgment, and it is ordered that the same be affirmed.

Judgment affirmed.

COMMUNITY PROPERTY, WHAT IS: See *Succession of Packwood*, 43 Am. Dec. 230.

PRESUMPTION THAT PROPERTY PURCHASED DURING MARRIAGE is community property is very cogent, and can only be repelled by clear and positive proof that it was purchased with the individual money or property of one of the partners: *Chapman v. Allen*, 15 Tex. 283; *Smith v. Smith*, 12 Cal. 224; *Meyer v. Kinzer*, Id. 252; *Peck v. Vandenberg*, 30 Id. 38, all citing the principal case. Property purchased during marriage, whether the conveyance be in the name of the husband or wife, or in the joint names of both, is to be taken *prima facie* to belong to the community: *Mitchell v. Marr*, 26 Tex. 331; *Zorn v. Tarver*, 45 Id. 521; *Ramedell v. Fuller*, 28 Cal. 42, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Veramendi v. Hutchins*, 48 Tex. 550, to the point that the interest of husband and wife in community property is equal, and it is immaterial whether the grant or deed thereto be in the name of the husband or wife, or in the names of both jointly.

CRAVENS v. BOOTH.

[8 TEXAS, 243.]

MARRIED WOMAN IS BOUND BY HER FRAUDULENT REPRESENTATIONS, voluntarily made, in reference to her separate property. If she makes admissions and representations in respect to her rights of property, by which others are deceived and induced to give credit to her husband on the faith of the property, she will be precluded from asserting her claim

against the rights of those who have confided in and acted upon her representations and admissions, whether they were true or false.

APPEAL from Shelby. The appellant recovered a judgment against John T. Booth, and had execution issued thereon, which was levied on certain negroes as the property of the judgment debtor. The appellee, the wife of John T. Booth, claimed the property, and there was a trial of the right of property. The evidence showed that the defendant in execution had been in possession of the negroes since 1844. The appellee claimed them under a deed of gift dated February 15, 1848. In 1845 or 1846 Mrs. Booth stated to two witnesses that a report had been circulated that she owned the slaves, and that they were not liable for her husband's debts, and that in consequence of this report his credit was injured. She said that the report was false, and that the property belonged to her husband. It was also in evidence that a witness who heard this conversation related it to Cravens, the plaintiff in execution, who afterwards made the trade with Booth out of which grew the indebtedness upon which the judgment was founded. The court charged the jury that "no admissions made by the claimant as to the ownership of the property in controversy could bind her if untrue in fact, although they had been acted upon by the plaintiff, and credit given to her husband by the plaintiff in consequence of said admissions; and that said admissions could only be considered by the jury as proof or disproof of ownership of said property." There was a verdict for the claimant.

T. J. Jennings, for the appellant.

Henderson and Jones, for the appellee.

By Court, **WHEELER, J.** It is evident that the charge of the court was calculated to impress the jury with the belief that the rule of law, which holds a party concluded by his representations and admissions which have been acted upon by others, does not apply to a married woman; and that she is in no case bound by her fraudulent representations in respect to her separate property.

The law, however, is otherwise. While it extends its protection to the rights of a married woman, it does not permit her to act fraudulently or inequitably to the injury of others. In the language of Mr. Justice McLean, in *Bein v. Heath*, 6 How. 238, "the law protects her, but it gives her no license to commit a fraud against the rights of an innocent party."

A feme covert, acting on her own responsibility, may act

fraudulently, deceitfully, or inequitably, so as to deprive her of any claim for relief in a court of equity. This results from the capacity to hold property and make contracts with which the law invests her: *Id.* 247. Her voluntary acts and representations made to deceive, and which do deceive others to their prejudice, will be binding upon her. If she makes admissions and representations in respect to her rights of property, by which others are deceived and induced to give credit to her husband, on the faith of the property, she will be precluded from asserting her claim against the rights of those who have confided in and acted upon her representations and admissions. "Indeed," says Story, in treating of fraudulent concealments and representations, "cases of this sort are viewed with so much disfavor by courts of equity that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practice deceptions or cheats on other innocent persons:" 1 Story's Eq. Jur., sec. 385.

"It is a well-settled principle of the law, from the influence of which not even married women are exempted, that "admissions which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced." "The party is estopped, on grounds of public policy and good faith, from repudiating his own representations:" 1 Greenl. Ev., sec. 207. "It makes no difference, in the operation of this rule, whether the thing admitted was true or false—it being the fact that it has been acted upon that renders it conclusive:" *Id.*, sec. 208.

There can be no doubt that the instruction given to the jury was erroneous; and very little, I apprehend, that it induced them to find a verdict for the claimant in this case.

The judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

VOLUNTARY ACTS AND REPRESENTATIONS OF MARRIED WOMAN, MADE WITH INTENT TO DECEIVE, AND WHICH DO DECEIVE OTHERS TO THEIR PREJUDICE, ARE BINDING UPON HER. Coverture is no excuse, in equity, for fraud; and a party entitled to relief in a court of equity will not be denied such relief simply because the person by whose fraudulent act he has been injured is a married woman: *Fonbl. Eq.*, b. 1, c. 3, sec. 4; 1 Story's Eq. Jur., sec. 385; 2 Pomeroy's Eq. Jur., sec. 945; *Savage v. Foster*, 9 Mod. 35; *Vaughan v. Vanderstegen*, 2 Drew. 363; *Sharpe v. Foy*, L. R., 4 Ch. App. Cas., 35; *In re Lush's Trusts*, *Id.* 591; *McHenry v. Davies*, L. R., 10 Eq., 88; *Jones v. Kearney*, 1 Dr. & War. 134; *Hobday v. Peters*, 23 Beav. 354; *Curd v. Dodds*,

6 Bush, 681; *Schmitheimer v. Eiseman*, 7 Id. 298; *Barham v. Turbeville*, 57 Am. Dec. 782. Story says: "Neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practice deception or cheats on other innocent persons:" 1 Story Eq. Jur., sec. 385. And McKinney, J., delivering the opinion of the court in *Pilcher v. Smith*, 2 Head, 211, said: "The legal disability of coverture or of infancy carries with it no license or privilege to practice fraud or deception on other innocent persons; nor will the disability be permitted to protect them in doing so."

The tendency of modern authority is to enforce the doctrine of equitable estoppel against married women as against persons who are *sui juris*, with but little if any limitation on account of their disability. This seems to be the case even in England, and in those states in this country that have not yet by their legislation freed the property of the wife from the control of her husband: 2 Pomeroy's Eq. Jur., sec. 814; *Jones v. Frost*, L. R., 7 Ch. App. Cas., 773; *Drake v. Glover*, 30 Ala. 382; *Connolly v. Branstler*, 3 Bush, 702; *Bigelow v. Foss*, 59 Me. 162; *Frazier v. Gelston*, 35 Md. 298; *Brinkerhoff v. Brinkerhoff*, 23 N. J. Eq. 477; *Carpenter v. Carpenter*, 25 Id. 194; *Couch v. Sutton*, 1 Grant Cas. 114; *McCullough v. Wilson*, 21 Pa. St. 436. Dodd, V. C., in delivering the opinion of the court in *Brinkerhoff v. Brinkerhoff*, 23 N. J. Eq. 483, said: "If she then believed she had a good claim, she should have spoken before the settlement was concluded and acted on. Good faith so required; and having been silent when she ought to have spoken, equity will not permit her to speak now to the prejudice of one misled by her silence." In the case of *Carpenter v. Carpenter*, *supra*, representations were made by a debtor, in the presence of his wife, of the value of his property, which was then, and had been for several years, in his wife's name, by which representations another was induced to suppose that he was the owner of the property, and was led to bind himself for the payment of moneys, which he was subsequently obliged to pay, and the court held that the wife was estopped from setting up her title to the property as against this creditor. But in those states whose statutes enable married women to enter into contracts as though they were single, the doctrine of equitable estoppel is held to apply to them without any limitation: 2 Pomeroy's Eq. Jur., sec. 814; *McCaa v. Wolf*, 42 Ala. 389; *Hockett v. Bailey*, 86 Ill. 74; *Bodine v. Killeen*, 53 N. Y. 93; *Dingens v. Clancey*, 67 Barb. 566; *Treman v. Allen*, 15 Hun, 4; *Towles v. Fisher*, 77 N. C. 437; *Fryer v. Rishell*, 84 Pa. St. 521; *Godfrey v. Thornton*, 46 Wis. 677; *Hartwell v. Jackson*, 7 Tex. 581; *Allen v. Urquhart*, 19 Id. 480; *Berry v. Donley*, 26 Id. 737; *Holliman v. Smith*, 39 Id. 357; *Ryan v. Maxey*, 43 Id. 192; *Klein v. Glass*, 53 Id. 44, the last five citing the principal case; *Bein v. Heath*, 6 How. 228. In *Dingens v. Clancey*, 67 Barb. 569, Smith, J., delivering the opinion of the court, said: "Married women who own property and control and manage it, and carry on business thereon and therewith, in the same manner as if they were unmarried or men, should be held to all the legal responsibilities growing out of the exercise of such rights, precisely as though they were in fact men. They can not be allowed to hold out false appearances in such business or matters more than men; nor allowed to use their irresponsible husbands as a cover, or as agents or instruments of dishonesty and fraud." And Allen, J., delivering the opinion of the court in *Bodine v. Killeen*, 53 N. Y., 96, said: "With the removal of common-law disabilities from married women, corresponding liabilities have necessarily been imposed upon them. They take the civil rights and privileges conferred, subject to all the incidental and correlative burdens and obliga-

tions, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances. To the extent and in the matters of business in which they are by law permitted to engage, they owe the same duty to those with whom they deal and to the public, and may be bound in the same manner, as if they were unmarried. Their common-law incapacity can not serve as a shield to protect them from the consequences of their acts, when they have statutory capacity to act. A married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others of full capacity to act for themselves." In *Hockett v. Bailey*, 86 Ill. 74, the court decided that if a wife allows her husband to use her capital as his own, to invest and reinvest it in his own name, and thereby obtain credit on the faith of his being the owner of it, she will not be allowed to interpose her claim to such property to the injury of her husband's creditors. Bonner, J., delivering the opinion of the court in *Klein v. Glass*, 53 Tex. 44, said: "Although the law extends its protecting shield over the just rights of a married woman, she should not, more than any one else, be permitted to induce third persons to extend to the husband credit on the faith of her own solemn deed, and then, after they have obtained the benefit of their joint act, repudiate it, to the injury of the third person." And in *Berry v. Donley*, 26 Id. 746, Moore, J., delivering the opinion, said: "It is not questioned that a married woman may, by her fraudulent acts or representations, by which other parties have been misled, or upon which they have acted, in some cases, be estopped from claiming title, or from the recovery of her separate property. Where a party has been induced to purchase upon the fraudulent admissions or representations that the property belongs to her husband, she will not be permitted to recover it."

A married woman who, knowing her own title, does not give notice of it to a purchaser will never be allowed to set it up against such purchaser: 2 Pomeroy's Eq. Jur., sec. 780; *Savage v. Foster*, 9 Mod. 35; *Sharpe v. Foy*, L. R., 4 Ch. App. Cas., 35; *Vaughan v. Vanderstegen*, 2 Drew. 408; *Hobday v. Peters*, 28 Beav. 354; *In re Lush's Trusts*, L. R., 4 Ch. App. Cas., 591; *Drake v. Glover*, 30 Ala. 382; *Connolly v. Branstler*, 3 Bush, 702; *Maloney v. Horan*, 53 Barb. 29; *Godfrey v. Thornton*, 46 Wis. 677. In *Howell v. Hale*, 5 Lea, 405, it was decided that a married woman who, by her assurances and representations, induces one to purchase a mortgage on her land is estopped from afterwards denying the consideration of the mortgage. And in *Robb v. Sheppard*, 50 Mich. 189, the plaintiff, who had been bitten by a dog, asked the defendant, a married woman, with the object of ascertaining the ownership of the dog, to whom the dog belonged, and was told by her that she was the owner, and it was held that she was estopped from denying that she was the owner, although it appeared that the dog belonged to or was kept by her husband.

Some authorities hold that, as a married woman can not be directly bound by her contracts, even when accompanied by fraud, so she can not be indirectly bound by estoppel: 2 Pomeroy's Eq. Jur., sec. 814; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Lowell v. Daniels*, 2 Gray, 161; *Bemis v. Call*, 10 Allen, 512; *Merriam v. Boston, C. & F. R. R. Co.*, 117 Mass. 241; *Rumfelt v. Clemens*, 46 Pa. St. 455; *Keen v. Hartman*, 48 Id. 497; *Glidden v. Strupler*, 52 Id. 400; *Williams v. Baker*, 71 Id. 476. In reference to these cases Professor Pomeroy says: "These decisions seem to be in opposition to the general current of authority:"

2 Pomeroy's Eq. Jur., sec. 814. Bishop, after reviewing the doctrine of these cases, says: "But if the case is one in which the married woman does not undertake to make a conveyance or a contract, if there is no question of her capacity involved, if the only inquiry concerns the effect of her fraud as an estoppel, no reason occurs to the author why, in the absence of coercion from the husband, she should not suffer the consequences of her fraud, the same as though she were not under coverture. For example, if a person not under disabilities owns real estate, he can convey it only by deed; yet, if another person claiming this real estate undertakes to sell it, and the true owner being appealed to admits the claim to be good, he is estopped to dispute a title bought in reliance on this admission. He loses his estate by an act in parol, though the law authorizes him to convey it only by deed. And the same rule ought in reason to be applied—and, the author submits, is in the better authorities applied—to the wife disclaiming ownership in her lands, under the like circumstances. The question is not one of power to convey. If a man can lose his lands by estoppel, when the general law authorizes him to convey them only by deed, it is impossible to find a good legal reason why a wife may not lose hers by estoppel, though the general law qualifies her to convey them only by a deed executed jointly with her husband:" 2 Bish. Married Women, sec. 490. See also Bigelow on Estoppel, 3d ed., 513.

THE PRINCIPAL CASE IS CITED IN *Fitzgerald v. Turner*, 43 Tex. 84, to the point that to pass title from a married woman her privy acknowledgment must be taken in accordance with the statute, unless by some fraudulent act on her part, which is relied upon and acted on, she is estopped from setting up claim to the land. It is also distinguished in *Cross v. Everts*, 28 Id. 534.

BOULWARE, ADMINISTRATOR, v. ROBINSON.

[3 TEXAS, 327.]

WHERE SURETY ON BOND DISCHARGES OBLIGATION OF HIMSELF AND PRINCIPAL by giving his own negotiable note, which the obligee accepts in full satisfaction, he may maintain an action against his principal for the amount of such note before he pays it; but where he has discharged the obligation by giving a bond or other non-negotiable security, he can recover only the amount actually paid by him since giving the security.

APPEAL from Harrison. The appellee sued the appellant to recover money paid by him for Moore, of whose estate the appellant was administrator. Prewitt was surety for Moore in an injunction bond. Prewitt died, and judgment was recovered on the bond against his executors, of whom Robinson was one. Robinson paid part of the amount of this judgment, and gave his bond for the residue, which was received in full satisfaction of the injunction bond: Robinson paid part of the money due on his bond, and a part remained unpaid. There was a verdict and judgment for the plaintiff for the full amount of the judgment on the injunction bond. The defendant appealed.

C. M. Adams and J. R. Mahone, for the appellant

W. P. Hill, for the appellee.

By Court, WHEELER, J. The assignment of errors embraces various matters which it is not deemed material to notice. Much of the argument of counsel for the appellant relates to the admissibility of evidence admitted without objection at the trial, and other matters not properly presented by the record for revision.

The only question presented by the record which is deemed to require notice is as to the right of the plaintiff to recover in this action the balance of the amount for which he had become liable by giving his bond, but which he had not actually paid.

In treating of the proof necessary to entitle the plaintiff to recover under the count for money paid, Professor Greenleaf, in his treatise on evidence, says: "Whether the plaintiff can recover under this count, without proof of the actual payment of money, and by only showing that he had become liable, at all events, to pay money for the defendant, is a point upon which there has been some apparent conflict of decisions. It has been held in England that where the plaintiff had given his own negotiable promissory note, which the creditor accepted as a substitute for the debt due by the defendant, he was entitled to recover the amount under this count, though the note still remained unpaid. And it has also been held that where he had become liable for the debt by giving his bond, though he thereby procured the defendant's discharge, he could not recover the amount from the defendant until he had actually paid the money due by the bond. The latter rule has been adopted and followed by the American courts, on the ground that the bond is not negotiable, nor treated as money in the ordinary transactions of business:" 2 Greenl. Ev., sec. 113.

This distinction between the giving by the plaintiff of a bill of exchange or negotiable note, which has been accepted by a creditor in satisfaction of the defendant's debt, and the giving of a bond or other security, not negotiable, which has been in like manner accepted, seems to have been maintained by the English and American courts, and must be received as the settled law: 2 Greenl. Ev., sec. 113, and cases cited in notes; Chit. Con., 5th Am. ed., 592; 2 Stark. Ev., pt. 2, 7th Am. ed., 1060; *Maxwell v. Jameson*, 2 Barn. & Ald. 51; *Power v. Butcher*, 10 Barn. & Cress. 329, 346; *Cumming v. Hackley*, 8 Johns. 202; *Cornwall v. Gould*, 4 Pick. 447; *Morrison v. Berkey*, 7 Serg. & R.

238. While a discharge of the debt by the surety, in the former mode, will enable him to maintain the action for money paid, a discharge in the latter will not.

From this doctrine it results that in the present case the plaintiff was not entitled to recover, except for the amount actually paid, and the verdict was excessive in that it included the amount remaining unpaid upon his bond. The judgment must therefore be reversed, and the cause remanded, unless the appellee shall remit the excess improperly allowed by the verdict, in which case judgment will be rendered for the residue to which he is entitled.

Ordered accordingly.

RIGHT OF SURETY TO COMPEL PRINCIPAL TO PAY DEBT: See *Forbes v. Smith*, 49 Am. Dec. 432, note 435, where other cases are collected.

WOMACK, ADMINISTRATOR, v. WOMACK.

[8 TEXAS, 397.]

STATUTE PRESCRIBING MODE OF CONVEYING WIFE'S PROPERTY does not declare absolutely void any other mode of conveyance; its only object seems to have been to secure freedom of will and action on her part. If she was free to act and so declared, and further declared that she did not wish to retract, all the circumstances concurred which were made necessary by law to pass her title to property, and her conveyance will be sustained, notwithstanding the want of a privy examination under the statute, particularly in a case where the party dealing with her can not be restored to his former position.

PRIVATE PROPERTY OF EACH PARTNER IN MATRIMONIAL UNION must, as a general rule, bear its own charges and expenses.

CONVEYANCE BY WIFE OF HER SEPARATE PROPERTY IN DISCHARGE OF DEBT chargeable exclusively upon and incurred for the preservation of her separate estate will be sustained, without her privy examination, under the statute, if made voluntarily, and without any imposition being practiced upon her.

MARRIED WOMAN MAY BE SUED FOR RECOVERY OF DEBT incurred in the preservation of her separate estate, and if judgment be recovered against her, execution may be levied on her separate property. On proper application, the levy might be restrained to the proceeds first, and if they proved insufficient, then to be made on the *corpus*; but in the absence of specific directions, the levy would be carried into effect on the property of the wife in the same mode in which executions against property are usually enforced.

DEBT BARRED BY STATUTE OF LIMITATIONS IS SUFFICIENT CONSIDERATION to support a new engagement or promise.

APPEAL from Harrison. This was an action for the recovery of a negro slave alleged to have been the property of the plaintiff's intestate. The instrument referred to in the opinion was in the following words: "Harrison county, Texas. Received four hundred dollars in cash, paid me in hand, from E. P. Womack, for a negro boy named Daniel, aged about fifty years. I warrant and defend the title of said negro, and to be sound in mind and body and slave for life, this the eighth January, 1850. Ann Womack, Jacob P. Womack." It was admitted that at the time of the sale the said Ann was a married woman; that she owned the negro in her separate right; that she was not privily examined in regard to the sale, as prescribed by statute; that the defendant was in possession of said negro, who was worth the sum of four hundred dollars; and that the plaintiff was the administrator of said Ann Womack, deceased. The court adjudged that the plaintiff recover the negro upon paying to the defendant the sum of four hundred dollars, and that the defendant have and retain possession of said slave until the said sum be paid. Plaintiff appealed. The other facts sufficiently appear from the opinion.

A. H. Wilson, and Clough and Lane, for the appellant.

Wigfall and Hyde, for the appellee.

By Court, HEMPHILL, C. J. This cause has been argued with great ability; and it is to be regretted, that, at this late day of the session, the subjects so luminously discussed, can receive comparatively but a slight examination. The only doubt, if doubt can exist at all, is whether judgment should not have been against the plaintiff, and that the property be vested in the defendant. That a married woman holds her property by as high, as full, and as perfect a title as does her husband his separate property, is a proposition not to be questioned; and if the law has placed restrictions upon her power of disposition of such property, and has required her to undergo a privy examination before a public officer, in order to validate her conveyance, the restriction is for her benefit, and proceeds upon the ground that, as the husband is the head of the family, and she is placed in many respects under his control, there is danger that her act, in the execution of the conveyance, may not be altogether voluntary, but may be induced by coercion on the part of the husband. To shield the wife, the law requires that in the conveyance of her property she must privily and apart from her husband acknowledge that the conveyance was her act, that

she had willingly signed, sealed, and delivered the same, and that she wished not to retract it; and this being done, it is declared by the statute that the deed shall pass all the right, title, and interest which the husband or the wife may have in the property conveyed. Some acknowledgment of this kind from a married woman, on conveyance of her property, is required in England and in all of the states of the United States under the control of common-law jurisprudence. But in none of the states but Texas does any such provision extend to all of her property, or to the separate property of the wife held under marriage settlements or other deeds of trust. In relation to this, she is considered in England, and in some, perhaps most, of the states, as possessing the powers and capacities of a *feme sole*, while in others she is restricted, in her transfers and control over such property, to the specific mode pointed out by the deed or instrument by which it was vested in her.

The statute which prescribes the mode of conveying the wife's property does not expressly declare absolutely void any other mode of conveyance. It seems, from its terms, to have had but one object in view, and that was to secure the freedom of will and action on the part of the married woman. If she was free to act, and so declared it, and that she did not wish to retract, all the circumstances concurred, which were made necessary by the law to pass her title to the property.

Now, although there was no privy examination in this case, yet the facts show that there was the most perfect freedom on the part of the wife; that in fact she was the principal actor; that she not only assented to the conveyance, at the time of its execution, but that she always, up to the time of her death, remained satisfied with her act, and did at no time wish to retract. Under this state of the facts, the defendant might contend that he was equitably entitled to a decree carrying into effect an agreement which she had voluntarily made and continuously assented to until the moment of her death—and especially if the rescission of the contract would be greatly to his detriment, and he could not be placed in the condition in which he would have been had no such transaction taken place.

But the case for the defendant stands on much higher and stronger grounds. The debt was incurred altogether for the benefit—the preservation, in fact—of the separate estate of the wife. It was a charge, then, exclusively upon that estate. No question can arise, in this case, in relation to the liabilities of the husband. He was at the accrual of the debt, and continued

ever afterwards to be, notoriously insolvent; and even if he were solvent, yet the private property of each partner in the matrimonial union must, as a general rule, bear its own charges and expenses.

The debt for the part payment of which the negro was sold being, then, chargeable exclusively upon the separate estate of the wife, she had a right to discharge it out of the *corpus* or profits of said estate. She might have been sued for its recovery, and on judgment, the decree would have been that the execution be levied on her separate property. On proper application, this might be restrained to the proceeds first, and if they were insufficient, then to be levied on the *corpus* of the property; but without specific directions, the levy would be made and carried into effect on the property of the wife in the same mode in which executions against property are usually enforced. If she could be sued and forced out of her property to discharge this debt, what should prevent her from its voluntary payment, and from alienating a portion of her property for that purpose if such mode of payment be deemed by her advisable? The proof in this case is, that the negro was sold at his value, and there can not be a shadow of pretense that any imposition was practiced upon the wife.

We have stated that the rule in England and in some of the states is, that property conveyed for the separate use of a married woman may be disposed of (if she be not restricted exclusively to some special mode) by her as if she were a *feme sole*. The only question is as to her intention to convey or charge her estate. If this be clear, her act is valid and binding, and even in those states where it is held that she is limited to the mode prescribed in the instrument creating the estate; yet this restriction disables her only from charging her estate, merely by her own act, without an examination into the necessity and propriety of such charge by a court of equity. If the charge be necessary and proper, it will be sustained, and must be satisfied out of such estate: *Terry v. Hopkins*, 1 Hill Ch. 1; *Reid v. Lamar*, 1 Strobb. Eq. 27; *Cartwright v. Hollis*, 5 Tex. 152.

The defendant, then, in this case, has fully shown all the facts and circumstances which entitle him to a complete conveyance. He has shown not only the assent of the wife, and the consent of the husband, and her intention and wishes not to retract the act of conveyance, but he has further shown that the debt was incurred for and was justly chargeable upon her sep-

arate property, that it was a necessary charge, and that its payment by transfer of the property was voluntarily made. These facts bring the case within the control of a principle laid down in a case recently decided at the Galveston term, to the effect that the want of a formality in the execution of a deed of conveyance, a seal, for instance, would not exclude the instrument from being offered as evidence of the intention of the parties, but would only impose upon the claimant the necessity of proving all the facts which would entitle him to a conveyance, and that the paper, with such proof, would be sufficient title to support an action or maintain a defense.

Let us present another view of this case. If the conveyance be, as contended, absolutely void, it is not binding on either party. Let us suppose that the debt, before the bar of the statute was completed, had been paid by sale of a negro; and that the boy had subsequently died. Could the defendant afterwards, on pretense that the sale was void, have sued for and recovered his debt out of the estate of the wife? No doubt this could have been done if the sale were absolutely void and not binding on either party. Yet I apprehend that a suit by defendant, for the debt, under the circumstances, could not be maintained; but if it were defeated, it must be upon the ground that the sale was not void, but that notwithstanding the want of legal formalities, the conveyance would, under the facts of the case, be sanctioned, aided, and perfected.

But although we would have been better satisfied had the judgment supported the conveyance and vested the title in the defendant, yet, as he does not appeal, it is not essential or necessary that the judgment, in that particular, be disturbed. The decree accords with the dictates of honesty, and is sanctioned by the soundest principles of law and justice: Story's Eq., sec. 696.

In a late case at Galveston, in which infants attempted to set aside conveyances executed by them during infancy, it was held that, although on coming of age they might affirm or disavow their conveyances of real estate, yet, that as a general rule, they must restore the money or other property received as a consideration for said sale.

There is nothing in the question relative to the statute of limitations. The former contract, though barred, yet was a sufficient consideration to support the new engagement or promise.

In some of the remarks, by way of illustration, the first con-

tract may have been treated as not barred by the statute. This was done merely for convenience, as the remarks were not applicable to this case specially, but to all in which the like facts may be presented, and where the charge upon the estate may be one against which there is no bar.

Judgment affirmed.

JUDGMENTS AGAINST MARRIED WOMEN: See note to *Caldwell v. Walters*, 55 Am. Dec. 599, where this subject is discussed at length; *Smith v. Poythress*, 48 Id. 176.

SEPARATE PROPERTY OF MARRIED WOMEN, WHEN EQUITY CONSIDERS HER FEME SOLE AS TO: See *Bradford v. Greenway*, 52 Am. Dec. 203, note 209, where other cases are collected.

CONVEYANCE OF FEME COVERT, REQUISITES OF: See *Mason v. Brock*, 52 Am. Dec. 490, note 493, where other cases are collected.

SEPARATE PROPERTY OF FEME COVERT IS ANSWERABLE FOR DEBTS CONTRACTED FOR ITS BENEFIT: See *Hollis v. Francois*, 51 Am. Dec. 760, note 768, where other cases are collected; *Callahan v. Patterson*, Id. 712, note 717; *Dickson v. Miller*, 49 Id. 71, note 73.

POWER OF FEME COVERT OVER HER SEPARATE ESTATE: See *Callahan v. Patterson*, 51 Am. Dec. 712, note 717, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Bailey v. Hicks*, 16 Tex. 228, to the point that the separate estate of a married woman is liable for necessities supplied to her.

STATUTE PRESCRIBING MODE OF CONVEYING WIFE'S PROPERTY does not declare absolutely void any other mode of conveyance: *Clayton v. Frazier*, 33 Tex. 100; *Selover v. American R. C. Co.*, 7 Cal. 273, both citing the principal case.

THE PRINCIPAL CASE IS CRITICISED in *Fitzgerald v. Turner*, 43 Tex. 85-87.

PRIDGIN v. STRICKLAND.

[8 TEXAS, 427.]

OLD RULE FOR MEASURE OF DAMAGES IN TROVER, viz., the value of the thing at the time of conversion, and interest thereon up to the entry of judgment, has no application to the remedial system of Texas. In that state the amount of damages will vary according to the particular property to which it may be applied.

OWNER OF SLAVE UNLAWFULLY DETAINED MAY RECOVER NOT ONLY HIS VALUE, but also damages for the value of his services from the time of the demand up to the time of the trial. And the jury may find the value and the specific damages in distinct amounts.

SUPREME COURT WILL PRESUME THAT AMENDMENT TO PETITION WAS DISREGARDED by the court below, where the record does not anywhere show that it was acted on and approved by the court, and where the evidence and rulings might just as well have occurred on a trial upon the original as upon the amended petition.

AMENDMENT SHOULD NOT BE PERMITTED TO SUBSTITUTE NEW CAUSE OF ACTION.

PRAYER FOR RELIEF NEED NOT BE LOOKED TO FOR GROUNDS OF ACTION.

ERROR to Harrison. Suit to recover possession of a slave. The petition alleged that the plaintiff was the owner of the slave, and that the defendant had got possession of him and converted him to his use, and refused to deliver him up; it also alleged that the slave was worth one thousand dollars, and prayed judgment for damages to the amount of one thousand five hundred dollars. Afterwards an amended petition, referred to in the opinion, was filed, which was more in the form of a common-law action of detinue. The other facts appear from the opinion.

W. H. Bristow, for the plaintiff in error.

W. P. Hill, for the defendant in error.

By Court, **LIPSCOMB, J.** There have been presented several distinct grounds on which the court is asked to reverse the judgment in this case; but it is believed that everything material can be noticed under the objection to the amendment of the plaintiff's petition; and that therefore it is not essential to a correct decision that those points should be separately and distinctly examined; and it may well be remarked here, that all the embarrassment thrown around this case arises from an attempt to ingraft the common-law forms of action upon our system, when it is so clear, and has been so often announced in judicial opinions, that neither the action of trover nor detinue is known to our forum; and that our petition, in its structure, is more analogous to a bill in chancery, or to a special action on the case, than to any other forms known in other systems of jurisprudence.

The petition, as first framed, though very objectionable in this, that it had too many of the fictions to be found in the common-law declaration in trover, was more in conformity with what our petition ought to be than the amendment; and there can be but little doubt that the plaintiff could have achieved the same result, had it not been amended, which was afterwards given to him by the verdict of the jury. Whatever may have formerly been the difficulty in settling the rule of damages for an injury done, when that injury is susceptible of judicial cognizance in a civil suit, if the damage is immediate and not too remotely consequential, that it should be commensurate with the injury sustained, is a principle that is now believed to ob-

tain even in courts where they are fettered and in some measure controlled by long-established judicial usages under particular forms of actions. It is so in trover, in detinue, and in trespass; and what seems a little strange is, that this doctrine of extending the amount of damages to make it adequate to the injury, in its early growth received more encouragement in the English courts than in the common-law courts of the United States: See cases referred to in Sedgwick on Measure of Damages; *Fisher v. Prince*, 3 Burr. 1363; *Greening v. Wilkinson*, 1 Car. & P. 625. And there can be no doubt that it may safely be assumed that the old rule in the action of trover, that the value of the thing at the time of conversion and interest thereon up to the judgment, if not entirely abolished, has been subjected to so many exceptions as to leave it not worth preservation, and the amount of the damage will vary according to the particular property to which it may be applied; a workman would be allowed damage, not limited to the value of his tools at the time of conversion and interest thereon, but such amount as the jury might believe from the evidence would be more adequate to the loss he sustained in being deprived of their use in the exercise of his trade: *Shotwell v. Wendover*, 1 Johns. 65. And doubtless, on the same principle, the owner of a negro would be allowed to recover, not only his value, but damages for the value of his services from the time of the demand up to the time of the trial; and such, no doubt, would be the correct rule, and in practice has been acted upon, in our courts, on a petition setting forth an injury like the one complained of in this suit.

If the party injured and deprived of his property has a particular fancy or preference for the specific property, instead of recovering its value and damages for the detention, there is no change in the narration of the facts of the injury for which he seeks redress. In the concluding part, instead of asking damages to be adjudged to him, he will ask for the specific property to be delivered up, and damages for its detention; and the jury would then find for the plaintiff the property sued for, fixing an alternate value on the same, and damages equal to the actual injury sustained for its detention. On such finding, the judgment would be that the defendant should deliver up the property and pay the damages assessed for its detention; and on failure to deliver the property, the plaintiff should have judgment and execution for the value found by the jury, and the damages assessed for its detention. In the case under consideration, the jury have found the value of the slave eight hun-

dred dollars, and specific damages four hundred and fifty dollars. This would have been a good verdict if the original petition had stood alone, without its hybrid associate presented by the amendment. It would have been no objection to the verdict that the jury had found two distinct sums, that when added together formed the aggregate of the damages to which the plaintiff was entitled. Their finding the different sums only shows the rule by which they arrived at the result; and the judgment of the court could well have thrown together the two sums, as it has been done in this case. The verdict and the judgment are both just such as might well have been returned and rendered on the original petition, and both the jury and the judge seem to have disregarded the amendment.

Can we presume, from the record before us, that the court did disregard the amendment? I think we can; because the record nowhere shows that it had been acted on and approved by the court; nor was there any action on the defendant's exception to it; it seems to have been passed over in silence, and never brought to the notice of the court. The evidence introduced, and all the rulings of the court, as shown by the bills of exceptions, might just as well have occurred on a trial upon the original as upon the amended petition; hence, it may well be concluded that it was disregarded.

To the objection, so well presented by the counsel for the plaintiff in error, on the hypothesis that the amendment had received the sanction of the court, that a party ought not to be permitted to amend his petition in such way as to subject the defendant to answer a new cause of action; and he illustrated it by supposing that an amendment might introduce new matter, which, if it related back to the commencement of the suit, would deprive the defendant of the benefit of the statute of limitations that had completed the bar before the amendment; it is readily admitted an amendment drawing with it such consequences ought not to be received. The amendment offered, however, in this case, would not have, as it is believed, been attended with such grave results, if it had been received; and should an amendment, in any case, have such an effect, so far, at least, it would be error to receive so much of it. An amendment should not be permitted to substitute a new cause of action; but under our practice we are not prepared to say that we must look to the prayer of judgment for the designation of the grounds of action; our practice has never been so stringent.

We believe that there is no error in the record that can authorize a reversal of the judgment, and it is therefore affirmed.
Judgment affirmed.

MEASURE OF DAMAGES IN TROVER: See *Harker v. Demant*, 52 Am. Dec. 670, note 680, where other cases are collected.

AMENDMENTS, WHAT ALLOWABLE: See *Stewart v. Kelly*, 55 Am. Dec. 487, note 490, where other cases are collected. An amendment which introduces a new cause of action is not allowed: *Usher v. Skidmore*, 28 Tex. 621, citing the principal case.

RULE OF DAMAGES FOR DETENTION OF PROPERTY varies in Texas, with the character and use of the property: *Craddock v. Goodwin*, 54 Tex. 587, citing the principal case. In actions for the detention of property the plaintiff may claim as damages reasonable compensation for the use of the property, instead of legal interest on its value: *Carter v. Roland*, 53 Id. 548, citing the principal case. In suits for the conversion of property, the question of damages is for the decision of the jury: *Commercial Bank v. Jones*, 18 Id. 830, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Clavit v. Cloud*, 14 Tex. 55, to the point that in an action for the detention of a slave damages can only be computed from the time of demand.

FISK v. NORVEL, ADMINISTRATOR.

[9 TEXAS, 13.]

GRANT OF LIMITED ADMINISTRATION described as administration "*pro tem.*" in the statute is not rendered void by its being designated "*pendente lite*" in the grant, the statutory administration being for substantially the same purposes, and with like powers and limitations; still the statutory designation should be used by the court from which the letters issue.

ESTATE OF DECEDENT IN TEXAS VESTS IMMEDIATELY IN HEIRS. A qualified interest is subsequently vested in executors and administrators principally for the collection and payment of credits and debts, and at the completion of the trust the property remaining is to be restored to the heirs as the rightful proprietors.

HEIRS AFTER SUCCESSION HAS ONCE BEEN ADMINISTERED AND CLOSED have full ownership of decedent's property, with all the incidental rights of control, disposition, and actions for its recovery and possession.

PROBATE COURT CAN NOT REOPEN SUCCESSION which has once been administered and closed.

PROBATE COURT CAN NOT GRANT ADMINISTRATION PRO TEM. OR PENDENTE LITE after the succession has once been administered and closed.

GRANT BY PROBATE COURT OF ADMINISTRATION PRO TEM. OR PENDENTE LITE after succession has been closed is without its jurisdiction, void, and collaterally attackable.

ACTION by Norvel, the appellee, to recover a tract of land. Judgment was for the plaintiff, and a motion in arrest thereof was overruled. The opinion states the case.

Fisk and Armstrong, for the appellants.

Oldham and Marshall, for the appellee.

By Court, HEMPHILL, C. J. The appellee, Norvel, an administrator *pendente lite* of one Milton Hicks, deceased, sued the appellants for the recovery of a tract of land. One of the principal questions in the cause, and the only one which I shall examine, is whether the plaintiff, by virtue of the grant of administration *pendente lite*, had lawful authority to bring the action, or whether the grant was null and void, and conferred no right to represent the interests of the deceased.

The facts of the case as affecting this question are, that Milton Hicks departed this life in 1839; that administration, in the same year, was granted to Charles K. Reese, and continued in him until December, 1848, when his account with the estate for final settlement was filed, and it appearing to the court that the estate had been fully administered, it was ordered that the said account current be received and recorded, and said succession closed, and that the administrator be fully discharged, upon his presenting to the court a receipt that the effects of the estate remaining in his hands had been passed over to the heirs of the said deceased, or their legal representatives. Subsequently, in January, 1850, letters of administration *pendente lite* were granted by the said court to the appellee; but there was no evidence showing upon what facts such grant was obtained.

It is contended by the appellants that there is no such administration known to our laws as that of administration *pendente lite*. However that might be under the laws in force prior to the act of 1848, yet by that act provision is made for the appointment of an administrator, under the designation of an administrator *pro tem.*, for substantially the same purposes, and with the like powers and limitations, of an administrator *pendente lite*. To authorize the grant of either, there must be a contest pending respecting the probate of a will, or the right of administration. On the conclusion of the suit, the grant, whether denominated "*pendente lite*" or "*pro tem.*," is terminated: Dig., art. 1137; 1 Williams on Executors, 409. The designation of the administration by the terms "*pendente lite*," instead of "*pro tem.*," is not fatal to the grant; but the latter terms, being those employed in the statute, should be used by the court from which the letters issue.

It being determined, then, that the grant of limited administration, described as "*pro tem.*," in the twenty-eighth section of

the statute, art. 1137, would not be rendered void by its being designated "*pendente lite*," the question arises whether, under the facts of this case, as alleged and proven, the probate court had any lawful authority to grant such administration, whether it be under the description of "*pendente lite*" or "*pro tem.*"

It appears from the record that general letters of administration upon this estate had been granted more than ten years previous to the commencement of this suit to Charles K. Reese, and that more than one year antecedent to the grant of this administration *pendente lite*, the said Reese had filed his account current for final settlement with the estate, that the same was received and approved, and the succession having been fully administered, as stated in the decree of the court, was ordered to be closed, and the administrator discharged on his producing a voucher that the effects of the deceased had been passed to the representatives of the deceased. It appears from this decree that all the purposes legally within the scope of administration had been effected; that the necessity for continuing the succession open had ceased; and it was ordered to be closed. If open for any purpose, it was merely for the formal discharge of the administrator on production of his receipt from the heirs.

The rights of the latter to the exclusive control and possession of the property, as it existed at the close of administration, had accrued; and unless they could again be rightfully divested for administrative purposes, the grant of this administration must be void.

All letters of administration, whether general or special, are for purposes more or less temporary. The duration of even general letters of administration was, under former laws, precisely fixed with power, under special circumstances, of prolongation; and under the existing statutes, the policy of speedy administration and adjustment, in order that the succession may be closed, is continued. At the death of a deceased, all his property vests immediately in his heirs, whether they be testamentary or *ab intestato*. Such was the law at the death of the intestate Hicks; but under the law as it then existed, his heirs had the privilege of accepting the estate, with or without the benefit of inventory. If accepted without inventory, there was no necessity for the appointment of an administrator, for the heirs became unconditionally liable for the payment of debts. By the law now in force, the whole estate vests in the heirs, subject, with certain exceptions, to the payment of his debts; but upon the issuance of letters testamentary or of administra-

tion, the executor or administrator has a right to the possession of the estate as it existed at the death of the deceased, in trust for the disposition of the same, under the provisions of the act: Art. 1221.

The estate, then, at the death, vests immediately in the heirs, as the true and full owners. A qualified interest is subsequently vested in executors and administrators, principally for the collection and payment of debts and demands for and against the estate; and when the object of the trust is satisfied, the property remaining is again to be restored to the heirs, as rightful proprietors. Nay, under the provisions of the statute, the heirs are not to be deprived of the enjoyment of the property until the debts are completely discharged. After the expiration of twelve months from the grant of administration, the heirs may require partition of the residue, the administrator retaining sufficient to pay all the debts allowed, approved, or established, or rejected or disapproved, and which may be established; and no suit on a claim for money can be subsequently instituted against an executor or administrator, but the holder shall have his action against the heirs, devisees, or legatees: Arts. 1196, 1197.

These provisions show that when a succession has once been administered and closed, the effects are, by operation of law, restored to the heirs. They have the full ownership, with all the incidental rights of control, disposition, and actions for its recovery and possession. What possible beneficial purpose could be secured by a second administration? The heirs can prosecute their own rights, disembarrassed of any supposed interest in an executor or administrator. Should they labor under disability from infancy or coverture, the law has provided for their protection, but not through the agency of an executor or administrator.

Were it not for the express authority of law, the probate court could not originally take the estate out of the heirs to vest it in an administrator. For certain purposes, this is permitted; but when the trust is executed, and the property restored to the heirs, disincumbered of all the relations growing out of the trust, where is the authority for again disturbing the heirs, and placing the estate once more under administration? Such intrusion, as we have before stated, is not necessary for the benefit of the heir; nor is it necessary for creditors. They have their action against the heirs, devisees, and legatees; and if even expedient, yet such power could not be exercised, unless author-

ized by law. If, then, the court has no rightful power to reopen a succession which has once been fully administered and finally closed, the attempt to do so in this case must be void, and the grant of administration absolutely null.

It may be said that the court, having the right, in proper cases, to grant letters of administration *pro tem.* or *pendente lite*, it must be presumed, when the question is raised collaterally, that the circumstances existed which justified the exercise of the power, or that the judge, having power to perform such act, if, in the exercise of his discretion, he acted improperly, the act is only voidable and not void, and can not be incidentally questioned by third persons.

That the probate court has extensive authority over all matters pertaining to the estates of deceased persons is true; and it is equally clear that all its acts on subjects within its cognizance, however erroneous they may be, are voidable, not void. If, at the opening of the succession, the judge had improperly granted letters of administration *pendente lite*, these might have been subsequently revoked; but the acts of the administrator, as an officer *de facto*, would have been valid, and could not have been, by third persons, collaterally attacked; that would have been a case in which the court might have rightfully the power to grant administration to some one; but under the facts of this case he had no power to grant administration to any. His grant is not regarded in the light of an erroneous act of a tribunal having jurisdiction over the subject-matter, but as the act of a court without jurisdiction.

As the point under discussion has been well illustrated in the case of *Griffith v. Frazier*, 8 Cranch, 9, I will cite some passages from the opinion in which the distinction is drawn between the void and voidable acts of a court having testamentary jurisdiction. "To give the ordinary jurisdiction, a case in which by law letters of administration may issue must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted not according to law, still the act is binding until annulled by the competent authority: because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void; yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others is dead or in life. It is a branch of every case in which letters

of administration issue; yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not within his jurisdiction—it was not committed to him by law, and it was not one in which he had a right to deliberate.”

Other cases in which the act of a probate court, in the grant of administration, would be absolutely void were referred to, for illustration. It was held that the appointment of an administrator on the estate of a deceased whose executor was present, in the constant performance of his duties, would be absolutely void; that the ownership, by the executor, of the chattels, for the purpose of administration, was incompatible with any power in the ordinary to transfer those chattels to another, by the grant of administration; and that such grant would pass nothing, and be absolutely void.

In this case, the power of the probate court over the estate, for the grant of administration, had ceased. No such case could have been presented as would have authorized the grant. The estate had vested or been restored to the heirs in full ownership. They were as much proprietors as was the intestate in his life-time. Their rights were exclusive and incompatible with any power in the probate court to transfer their property to another; and any attempt to do so was beyond the jurisdiction of the court, and a mere nullity.

Without further discussing this subject, we are of opinion that the grant of administration to the appellee was void; that it conferred no right or power upon him to represent the deceased. The judgment must therefore be reversed, and the cause dismissed.

Reversed and dismissed.

JUDGMENT OF PROBATE COURT UPON MATTERS NOT WITHIN ITS JURISDICTION may be questioned collaterally: See *Lynch v. Baxter*, 51 Am. Dec. 735, and cases cited in the note; *McDade v. Burch*, 50 Id. 407, and note; *Bailey v. Dilworth*, 48 Id. 760; *Slatter v. Glover*, Id. 118; *Palmer v. Oakley*, 47 Id. 41. The principal case is cited in *Van Norman v. Wheeler*, 13 Tex. 315, and *Rose v. Newman*, 26 Id. 133, to the point that it may be proved in a collateral proceeding that a probate court had no jurisdiction, the estate having been closed.

APPOINTMENT OF ADMINISTRATOR BY PROBATE COURT is usually not collaterally impeachable: *McFarland v. Stone*, 44 Am. Dec. 325, and cases cited in the note. But if without its jurisdiction it is void: *Vick v. Vicksburg*, 31 Id. 167.

INTEREST OF HEIR IN LAND OF DECEDENT VESTS IMMEDIATELY UPON

DEATH OF ANCESTOR: *Hyde v. Barney*, 44 Am. Dec. 335. But this is not so at common law. It vests in the administrator *sub modo* only for the purposes of administration: *Easterling v. Blythe*, 56 Id. 45, and note. As to the personal property of the decedent, see *Potts v. Smith*, 24 Id. 359, and note to *Hubbard v. Ricart*, 23 Id. 200, which also discusses actions by heirs to recover possession of real or personal property of their ancestor before distribution in probate.

ACTIONS AGAINST HEIRS, DEVISEES, AND LEGATEES ON CLAIMS AGAINST DECEDENT'S ESTATE may be brought after the succession has been closed, and are limited only by the general statute of limitations. The principal case is cited to this effect in *Murchison v. Payne*, 37 Tex. 308.

NEW ADMINISTRATION CAN NOT BE GRANTED AFTER SUCCESSION HAS BEEN CLOSED.—The principal case is cited as authority to this effect in *Francis v. Hall*, 13 Tex. 193; *Giddings v. Steele*, 28 Id. 750. In *Guilford v. Love*, 49 Id. 748, it is cited to the point that an administration should not be reopened after great lapse of time except for grave reasons; and the purpose of completing a partition was there held insufficient to justify it.

HEIRS ARE ENTITLED TO DECEDENT'S PROPERTY AFTER DEBTS ARE PAID AND SUCCESSION CLOSED.—The principal case is cited to this point in *Boyle v. Forbes*, 9 Tex. 41, and *Hart v. Horton*, 12 Id. 288; but they should not be permitted to sue in their own right before that time: *Giddings v. Steele*, 28 Id. 748, citing the principal case. See *Easterling v. Blythe*, 56 Am. Dec. 45, and note.

RAMSEY v. McCAULEY.

[9 TEXAS, 106.]

AMENDMENT OF RECORD OF JUDGMENT CORRECTING MISTAKE IN NAMES provided for by statute, in which there is no limitation as to time within which it may be made, may be made at any time before final judgment has been rendered in the supreme court.

MISTAKE IN STATING TITLE OF CASE IN ENTERING VERDICT is a mistake of the clerk, not of the jury.

ERROR from Washington. After the plaintiff in error had procured, at the fall term, 1852, a writ of error to the judgment of the lower court in this case, the judgment was amended in the manner stated in the opinion, upon motion of the defendant in error, due notice having been given to the opposite party. The case is otherwise sufficiently stated in the opinion.

J. Webb, for the plaintiff in error.

J. Sayles, for the defendant in error.

By Court, LIPSCOMB, J. In this case, in the court below, when the clerk entered the verdict of the jury, in stating the case in the margin, he entered it "J. H. McCauley v. John Ramsey," and then entered the verdict of the jury. The whole proceedings

had been in the name of George J. McCauley against the plaintiff in error. The verdict did not give the name at all, and the judgment followed the verdict, without giving the name of the plaintiff, but referring to each as plaintiff and defendant, and not distinguished in any other way. This judgment was rendered at the spring term, 1850. The record shows that at the fall term, 1852, this error, if any, was corrected by order of the court, by the insertion of the name of the plaintiff.

It is contended by the plaintiff in error that the amendment was made too late, and the court below erred in its judgment in so rendering it, and the amendment could not cure the defect in the verdict and judgment, as at first entered. The amendment made in the court below is predicated on the seven hundred and eighty-sixth article, Hartley's Digest. It is as follows: "When, in the record of any judgment or decree of any district court, there shall be any mistake, miscalculation, misrecital, of any sum or sums of money, or of any name or names, and there shall be, among the records of the proceedings in the suit in which such judgment or decree shall be rendered, any verdict or instrument of writing, whereby such judgment or decree may be safely amended, it shall be the duty of the court in which such judgment or decree shall be rendered, and the judge thereof in vacation, to amend the judgment or decree thereby, according to the truth and justice of the case; provided, that the opposite party, his agent or attorney of record, shall have reasonable notice of the application for such amendment; and if the transcript of such judgment or decree, at the time of such amendment, or at any time thereafter, shall be removed to the supreme court, it shall be the duty of that court, upon inspection of such amended record, to be brought before it by *certiorari*, if need be, to affirm such judgment, if there be no other error apparent in such record."

It will be seen that there is no limitation as to time within which the amendment may be made, and we believe that if it be done at any time before the final judgment has been rendered in this court, it is sufficient under the statute; and that it was a case clearly within the article of the statute cited there can be no doubt, as the petition and the citation, and every distinct part of the record, preceding the entry of the verdict and judgment, could furnish the safe means of making the amendment, as each of them gave the true name of the plaintiff in the suit; and there can be no doubt but a reference to the original verdict, as returned into court, would have shown the same, as it is most

likely that it was written on the petition; and it was not an error or mistake of the jury, as supposed by the counsel for the plaintiff in error.

The verdict was correct; the mistake was made by the clerk in stating the title of the case in the margin before entering the verdict. The judgment is affirmed.

Judgment affirmed.

JUDGMENT MAY BE AMENDED SO AS TO MAKE NAMES OF PARTIES conform to writ and declaration: *Smith v. Redus*, 44 Am. Dec. 429; and see cases cited in the note. Judgment can not be amended unless authorized by matter of record: *Hudson v. Hudson*, 56 Id. 200.

JUDGMENT MAY BE AMENDED ON STATUTORY NOTICE ANY TIME BEFORE FINAL JUDGMENT in supreme court. The principal case is cited to this effect in *Russell v. Miller*, 40 Tex. 500.

AMENDMENT OF JUDGMENT UNDER STATUTE CURES ERROR. The principal case is cited as authority on this point in *Aldridge v. Mardoff*, 32 Tex. 208.

DE CORDOVA, ADM'R, v. SMITH'S ADM'X.

[9 TEXAS, 129.]

SPECIFIC PERFORMANCE WILL NOT BE DECREED when the remedy is not mutual or one party only is bound by the agreement.

BOTH COURTS OF LAW AND EQUITY TURN UNWILLING EAR to those who show no vigilance in the assertion of their rights.

PARTY ENTITLED TO SPECIFIC CONVEYANCE OF PROPERTY, personal or real, will not be permitted to hold back from an assertion of his rights, and speculate upon the chances of such changes as may decide whether it would be to his interest to have the conveyance made; but he is required to be vigilant and prompt in the assertion of those rights; and if changes have occurred during this lapse of time in the value of the property to be conveyed, or in the consideration to be paid, a court of equity will always refuse its aid, and leave the party to seek redress where the law had left him by a suit for the breach of the covenant.

LAPSE OF TIME CREATES PRESUMPTION THAT PARTIES HAVE WAIVED OR SETTLED THEIR RIGHTS, and stale claims when brought into a court of chancery are received without favor, and entitled to but little consideration unless attended with circumstances that will repel such presumption.

EQUITY FOLLOWS ANALOGY OF LAW OF LIMITATIONS OF FORUM in decreeing specific performance where there is no express limitation to the remedy.

QUERY AS TO APPLICATION OF RULE THAT EQUITY FOLLOWS ANALOGY OF STATUTE OF LIMITATIONS in case where a conveyance of land is the relief sought.

BILL OF PARTY GUILTY OF GROSS LACHES OR APPLYING FOR RELIEF AFTER LONG LAPSE OF TIME unexplained by equitable circumstances will be

dismissed, unless a part has been performed or paid, when the defendant will be decreed to refund, to make compensation, or to a specific performance.

LACHES MAY BE IMPUTED TO ONE SEEKING SPECIFIC PERFORMANCE from the time when the one against whom relief is sought has indicated by his acts or expressions his intention to abandon the contract.

IMPLIED TRUST IS ENDED AND TRUSTEE HOLDS ADVERSE TO CESTUI QUE TRUST from the time when he manifests an intention to claim and enjoy as his own the land subject to the trust, by failing to make a conveyance to the *cestui qui trust* at the time agreed upon, and by taking out a patent for the land in his own name.

SPECIFIC PERFORMANCE WILL NOT BE DECREED when there is strong, un rebutted *prima facie* evidence of a mutual abandonment of the contract.

THIS was an action by De Cordova, the administrator of Joseph Baker, deceased, against Maria J. Smith, the administratrix of J. W. Smith, deceased, and was commenced in 1848. It was based upon a contract entered into by the decedents in 1838. By this contract Smith, who owned a certificate, located upon certain described land, first agreed, since Baker had selected and improved the land, to convey to Baker all his interest acquired by the location, as soon as a survey of the tract should be completed, "it having been hitherto understood and agreed upon between the parties that the location is made for the benefit of said Baker." But it further appeared from the contract that Smith held in his own name as assignee a headright claim of one Casimero de la Garza for a league of land, on which a certificate had not yet been granted; but this claim really belonged to Baker. And if this claim should pass the board of land commissioners, Smith agreed to receive it in exchange for his own certificate located on the land in question, and to convey that land to Baker; but if it should not pass the board, Smith agreed to lift his own claim now located there, and to locate in the same place two certificates for one third of a league each, which belonged to Baker, but of which Smith had possession. In 1841 Smith obtained a patent for the land in his own name. In 1845 he died. The attorney for Smith's estate, Vanderlip, and the attorney for Baker's heirs, Fisher, being fully authorized, stipulated that as this land had been inventoried as Smith's property, and had been advertised for sale by order of the probate court, and in order to prevent injury to the sale by conflicting claims, the sale should proceed according to the order, without prejudice to the rights of either party in the proceeds of the sale. The land was accordingly sold. And the controversy in this action concerns the fund

resulting from the sale, the plaintiff's right depending upon the ability of Baker's estate to establish an equitable title to the land. The defendant proved that Smith applied for a certificate on the claim of Casimero de la Garza. The certificate was never granted. After Smith's death Baker came to San Antonio, and in a conversation with Vanderlip, the attorney for Smith's estate, the latter told him of a small note and account against him among Smith's papers, and Baker admitted the debt, but made no mention of his claim to the land. Vanderlip testified that there was much correspondence between Smith and Baker, but although Smith customarily preserved papers with care, that he found no reference to the transaction in controversy; and that in 1838 the land was worth but a few hundred dollars, but now it was worth five dollars per acre. It also appeared from the evidence that Baker was for several years, from 1839 or 1840, a translator of Spanish in the land office. The verdict was for the defendant; and a motion for a new trial being overruled, the plaintiff appealed. The appellant contended that Smith was by the agreement a trustee for Baker, and that even if the claim of Casimero de la Garza failed, Smith after obtaining the patent would remain trustee for two thirds of the league of land. The appellee urged the abandonment of the contract, as evidenced by the acts of the parties and the failure of Baker to assert his claim. And even if it was considered as not abandoned, the first part of the contract at all events could not stand, the condition precedent, that De la Garza's claim should pass the board, never having been performed, and the second part of the contract was without consideration. The appellee also urged laches and the statute of limitations.

I. A. and G. W. Paschal, for the appellant.

J. Webb and J. W. Harris, for the appellee.

By Court, LIPSCOMB, J. From the terms of the covenant of John W. Smith with Joseph Baker, and the circumstances which transpired between the date of its execution and the commencement of this suit, can the aid of a court of equity be invoked for a specific performance, or should the plaintiff be left to compensation in damages, if any, for its breach? This is the inquiry presented for our consideration; and the fact that the land in question has been sold by the administrator of Smith, under an order of sale made by the probate court, and the proceeds of that sale only, and not a conveyance of the land,

is now sought, can not divert our inquiry, whether a specific performance ought, under the circumstances, to be decreed, if the land had not been sold. Because if it would not, then the plaintiff has no right to the fund he is seeking to have applied to his use.

I will examine, first, the objection presented on the face of the covenant. It seems to me to want an essential element in its structure to give it effect, either against the maker or his representatives: it is wanting in not showing a valid consideration; and it wants mutuality. Smith is bound by it, when it imposes no corresponding obligation on Baker. Chancellor Kent says that "it seems to be very generally and very properly laid down in the books, that a court of equity will never decree performance when the remedy is not mutual, or one party only is bound by the agreement:" *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282; and he refers to *Armiger v. Clarke*, Bunb. 111; *Troughton v. Troughton*, 1 Ves. sen. 86; *Lawrenson v. Butler*, 11 Sch. & Lef. 13; *Bromley v. Jefferies*, 2 Vern. 415. The chancellor asserts the same principle in *Benedict v. Lynch*, 1 Johns. Ch. 374 [7 Am. Dec. 484], and says that a contrary doctrine had been held in some cases in England, but that from the more recent decisions, the principle he had laid down prevailed there now.

This is not, however, the ground on which I am instructed by my associates to rest the decision of the court. We believe that our decision can be placed more satisfactorily on the intrinsic merits of the case, admitting that the covenant ought to have been specifically performed, and that it was a fair subject for the exercise of equity jurisdiction to compel such performance, had the application been made within a reasonable time after the covenant had been broken, or after the time when Baker could have demanded performance from Smith. But if a party having rights will slumber on them for years, he need not be surprised, when he wakes up, to find that other rights have intervened to prevent the enforcement of his own. Both courts of law and equity turn an unwilling ear to those who show no vigilance in the assertion of their rights. By the covenant, Smith was bound to convey to Baker as soon as the survey had been made. It appears from the record that this was done on the first of June, 1838; and the patent to Smith bears date the ninth of June, 1841. The suit was brought to the spring term of the court, 1848.

What effect this lapse of time, near ten years, should have, on

the equitable rights of the plaintiff, will now be considered. It is an acknowledged rule of equitable jurisprudence, that a party entitled to a specific conveyance of property, personal or real, will not be permitted to hold back from an assertion of his rights, and speculate upon the chances of such changes as may decide whether it would be to his interest to have the conveyance made; but he is required to be vigilant and prompt in the assertion of those rights; and if changes have occurred during this lapse of time, in the value of the property to be conveyed, or in the consideration to be paid, a court of equity will always refuse its aid, and leave the party to seek redress, where the law had left him, by a suit for the breach of the covenant. Now, it is a matter of history, and the facts, too, are established by the record, that for years after this contract was entered into such was the uncertainty of the government's being able to sustain itself, and the Indians were so troublesome in the neighborhood of San Antonio, that land was considered of very little value, and many would have preferred an unlocated certificate to the best land in the vicinity of that place, both on account of trading it better, and affording an opportunity to locate in a neighborhood promising greater security. If the covenant had been then satisfied, Smith could have located other lands of nearly equal value to the land which is the subject of this suit; but now, an unlocated certificate would afford to his representatives no such advantage; the land has appreciated near tenfold; and it would be wholly impossible to decree a specific performance, upon any known principle of equity, and do justice to the representatives of Smith. This state of things could not have occurred had Baker, in the language of Lord Kenyon, quoted by the master of the rolls in *Milward v. Thanet*, 5 Ves. 720, note, "shown himself ready, desirous, prompt, and eager" in the assertion of his rights. We therefore come to the conclusion that a specific performance can not be decreed.

There is another aspect in which this case may be presented that would bring us very satisfactorily to the same conclusion. It is an old and well-established rule, familiar to equity jurisprudence, that lapse of time will create a presumption that the parties have waived or settled their rights, and such stale claims, when brought into a court of chancery, are received without favor and entitled to but little consideration, unless attended with circumstances that will repel such presumption. This doctrine will be found laid down by Chancellor Kent in *Ellison v. Moffat*, 1 Johns. Ch. 46, and in *Arden v. Arden*, Id. 313. It

will be found to have been uniformly acted upon and recognized by the court of chancery in South Carolina: *Riddlehoover v. Kinard*, 1 Hill Ch. 378; and in *Sims v. Aughtery*, 4 Strobb. Eq. 117. Chancellor Dargan, in giving the opinion of the appellate court, affirming the decree of Chancellor Dunkin, made on the circuit, uses the following strong language on this subject; the chancellor, following strictly the course of the decisions, makes these observations: "After the possession of twenty-five years, the court will presume a sale by the executor, for the payment of debts, an administrator *de bonis non* after Lyle's death, a sale by such administrator, or almost anything else, in order to quiet the possession." He adds: "This is strong language; but not stronger than is warranted by the authorities, or demanded by a stern, imperative public policy." And he says further: "The law requires diligence in the assertion of a right by legal actions. Life is short, parties and witnesses are mortal; memory is frail; written muniments are spread upon perishable materials, and are subject to many accidents; and time throws a veil of obscurity over transactions of the distant past: under circumstances like these, is it either unreasonable or unjust that he who has a claim should be required to assert it within a limited time?" This doctrine, in principle, is believed to prevail in some degree in every community of men, both savage and civilized; but in most if not in all of the states of the American Union, a period of time has been fixed upon by judicial sanction after which these presumptions will arise. Such rule, however, as to the period of time is not considered to have any influence beyond the jurisdiction of its own forum; and every court, governed by the rules of equity jurisprudence, must adapt it as to the length of time to peculiar circumstances. The same learned chancellor whose opinion has been last cited says: "As to the precise time at which they [presumptions] arise, each independent community must judge for itself. We have adopted the law of the mother country. In South Carolina as in England, by the lapse of twenty years without admissions, specialties and judgments are presumed to be satisfied, and trusts discharged."

The discussion of this subject, in the opinion of this court, at its last term, in *Lewis v. San Antonio*, 7 Tex. 288, sustains the proposition stated by the chancellor just cited, that each community may establish its own rule as to the precise time. It would, however, seem to us to be exceedingly difficult to lay down a rule that should be one of universal application. Each case

would depend, in some degree, on its own peculiar circumstances. If, however, a rule should be adopted in analogy to the rule prevailing in England, there would be many and cogent reasons against adopting the precise time prescribed by that rule. From the situation of our country, our records, muniments, and evidence of title are not so permanent and well secured as they are in old and well-regulated communities. And every one of observation would readily perceive and admit that there are more changes and incidents crowded into five years with us than could occur in twenty in England or in South Carolina. It would seem, then, that the principle could and would be better guarded, at any rate until our population has become more permanent and society better regulated, to be governed more by the peculiar circumstances than by any fixed rule as to time. The better authority seems, however, to be that a point of time should be assumed analogous to the law of limitations of the forum, where there is no express limitation to the remedy. The difficulty, then, is to determine to which law of limitation to refer as analogous to the relief sought. Mr. Angell says that when a conveyance of land is the relief sought, courts of equity will apply the statutory bar prescribed to the action of ejectment: Angell on Limitations, 25, sec. 2.

But suppose the case where there was no person in the actual possession of the land to which title was sued for, it may be doubtful whether either the five years that to the possessor gives a bar, or the ten years that bars an entry, would either of them apply; and if either, which one. If the legal title should be considered as giving a constructive possession, perhaps the five years; if not, it is difficult to perceive how the ten years could apply to such a case. If we had a statute of limitation that was express in barring the action, or one analogous, such limitation would be a good defense without resorting to any other attending circumstances. If we have none, express or analogous, it would seem that we could lay down the rule as to the time ourselves: Angell on Limitations, 24, sec. 1; but from the circumstances before noticed, we feel unwilling to do so.

There is another head of equitable jurisprudence that there can be no doubt had a common origin with all laws of limitation. We mean laches and neglect. Mr. Justice Story says: "If he [the party] has been guilty of gross laches, or if he applies for relief after a long lapse of time unexplained by equitable circumstances, his bill will be dismissed; for courts of equity do not, any more than courts of law, administer relief to the gross

negligence of suitors." To this rule, he says there is some qualification: 2 Story's Eq. Jur. 771. The qualification seems to be this, that although there may have been laches, yet if a part has been performed or paid, the bill will not be dismissed, but the defendant will be decreed to refund, to make compensation, or to a specific performance. What laches will be sufficient to defeat the equity depends upon circumstances. In the case cited by Chief Justice Hemphill, in *Hemming v. Zimmerschille*, 4 Tex. 166, the plaintiff had notice that defendant had abandoned his contract; did not file his bill for nearly a year afterwards; the delay was held to be unreasonable, and the bill dismissed: *Watson v. Reed*, 1 Russ. & M. 236; *King v. Hamilton*, 4 Pet. 311.

In the case of *Hemming v. Zimmerschille*, *supra*, the court say: "In the cases generally, where the effect of laches has been the subject of discussion, the contract had not been fully executed by either party; and the one against whom relief was sought had indicated by his acts or expressions his intention to disavow or abandon the contract." In the case under consideration, the obligee had nothing to do; if the exchange had been made agreeably to the contract, there would have been a full performance and execution of the covenant. If it was not made, each party would have been in the same condition they were in before, as each would have the same land; and when Smith indicated by his acts, such as a failure to convey as soon as the survey had been made, and the taking out the patent in his own name, the obligee, Baker, if he wished to compel its enforcement, then should have commenced suit. At all events, when Smith took the patent in his own name, and from that period, laches may be imputed to him. It is, however, contended on the part of the appellants that Smith became the trustee for Baker, and held the land in trust for him, and that it was a continued trust. The correctness of the principle is admitted, if there was nothing for Baker to do. But it is material to inquire how long, under the circumstances of this case, the trust continued. In the case of *Hemming v. Zimmerschille*, *supra*, the court uses the following language: "In this case the vendee having performed his obligation, the vendor's subsequent possession or interest in the land was held in trust, and in subordination to the superior equitable right of the vendee; and this possession would continue to maintain its fiduciary character until the vendor would manifest an intention to claim and enjoy the land as his own. The possession would then become adverse." To apply the principle, when Smith failed to make the conveyance, and took

the patent out in his own name, the trust was at an end, and he held adverse to Baker.

When the circumstances as presented by the record in this case are considered, they so strongly conduce to prove that the contract had been mutually abandoned that we have no hesitation in saying that such evidence, unrebutted, would have sustained a verdict of a jury for the defendant, had a suit been brought on the obligation to recover damages for its breach. We will recapitulate the strongest of this circumstantial evidence: it is the long acquiescence of Baker; the patent, recorded in the public archives of the country, which all persons are bound to take notice; Baker's being a clerk in the land office; his silence as to any right to the land or claim upon the estate, when Vanderlip told him that he was indebted to the estate, which he admitted; the death of Smith and Baker, cutting off the probability of better proof, before this suit was commenced. And the record presents nothing on the part of the appellant to rebut and explain this *prima facie* evidence of an abandonment. The judgment of the court below is affirmed.

Judgment affirmed.

LACHES, WHEN EQUITY WILL REFUSE RELIEF BECAUSE OF: See *Smith v. Thomson*, 54 Am. Dec. 126, with an extensive note discussing this subject; see *Williams v. Harrell*, 55 Id. 442; *Johnson v. Toulmin*, 52 Id. 212.

IMPLIED TRUSTS ARE SUBJECT TO STATUTE OF LIMITATIONS, and trustee of such trust may hold adversely: See *Moffatt v. Buchanan*, 54 Am. Dec. 41, and cases cited in the note.

CONTRACT BINDING ON ONE PARTY ONLY MAY BE SPECIFICALLY ENFORCED: *Rogers v. Saunders*, 33 Am. Dec. 635; see *Kerr v. Day*, 53 Id. 526.

WHERE FACTS SHOW ABANDONMENT OF CONTRACT, SPECIFIC PERFORMANCE WILL NOT BE DECREED: *Patterson v. Martz*, 34 Am. Dec. 474.

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME WHERE STATUTE OF LIMITATIONS DOES NOT APPLY: See *Smithpeter v. Ison's Administrators*, 53 Am. Dec. 732, and note.

LAPSE OF TIME AS BAR TO SPECIFIC PERFORMANCE: See *Andrews v. Sullivan*, 43 Am. Dec. 53, and cases cited in the note.

EQUITY FOLLOWS ANALOGY OF STATUTE OF LIMITATIONS: *Johnson v. Toulmin*, 52 Am. Dec. 212, and note citing prior cases; see *Phalen v. Clark*, 50 Id. 253. The principal case is cited to this point in *Gibson v. Fifer*, 21 Tex. 264; *State v. Purcell*, 16 Id. 310; *Fessenden v. Barrett*, 9 Tex. 479.

AFTER LAPSE OF TEN YEARS FROM ACCRUAL OF RIGHT, equitable relief will not be granted unless excuse for the delay is shown, such as the subsequent acknowledgment of the relation of vendor and vendee, and the like: *Carlisle v. Hart*, 27 Tex. 353, 354; *Cook v. Knott*, 28 Id. 90; *Rivers v. Washington*, 34 Id. 275, 276; *Flemming v. Reed*, 37 Id. 154; *Lawler v. Yeatman*, Id. 674 (twelve years), citing the principal case. But no period less than ten years will interpose a bar to an action where the purchase money has been

paid by the vendee, and the relation of trustee and *cestui que trust* has been established: *Yeary v. Cummin*, 28 Id. 95; but such period will be a bar: *McMasters v. Mills*, 30 Id. 595, citing the principal case. In *Wilson v. Palmer*, 18 Id. 595, the principal case is authority for the proposition that prior occupancy is a sufficient title to enable its possessor to recover in ejectment against a wrong-doer.

STATUTE OF LIMITATIONS COMMENCED RUNNING from the date when the possession became adverse. The principal case is cited to this point in *Anderson v. Stewart*, 15 Tex. 290. In *Redding v. Redding*, Id. 25, it was held, citing the principal case, that the adverse claim, having existed less than five years, was insufficient to defeat the plaintiff's claim.

AS TO LAPSE OF TIME THAT SHALL BAR SPECIFIC PERFORMANCE there is no decided rule; each case should in some degree depend on its own peculiar circumstances, for there may be circumstances to account for the delay. To this effect the principal case is cited in *Glasscock v. Nelson*, 26 Tex. 153; *Reed v. West*, 47 Id. 249.

IMPLIED TRUST UNDER AGREEMENT RESPECTING MUTUAL ACQUIREMENT AND CONVEYANCE OF LAND.—In *Gibbons v. Bell*, 45 Tex. 423, the principal case is cited to the point that under a contract by which parties agree to acquire land together, one furnishing the certificate and the other the labor and expense of surveying and patenting it, the party in whom the title is vested by patent holds it in trust for his co-tenant. The naked trust is in the patentee, held in subordination to the superior equitable right of the locator to the extent of the latter's undivided interest.

HORAN v. WAHRENBERGER.

[9 TEXAS, 313.]

JUDGMENT OF DISTRICT COURT REVISING MAGISTRATE'S JUDGMENT UPON ITS MERITS is without authority, and void.

JUDGMENT OF SUPREME COURT IS VOID IF RENDERED on appeal from district court in a case where the judgment of the district court was without authority, and void.

APPEAL CAN NOT CONFER ON COURT JURISDICTION THAT COURT A QUO DID NOT POSSESS.

JURISDICTION IS PRESUMED IN FAVOR OF JUDGMENT OF COURT OF GENERAL JURISDICTION; but must be shown in case of a judgment of a court of limited jurisdiction.

JUDGMENT OF ANY COURT HAVING NO JURISDICTION OF SUBJECT-MATTER IS VOID.

JUDGMENT RENDERED WITHOUT JURISDICTION IS NOT LESS VOID because rendered under an unconstitutional act giving jurisdiction.

EXECUTION SALE UNDER VOID JUDGMENT CONFERS NO TITLE upon the plaintiff in execution who purchases under it, but has not gone into possession; but *quære* as to the equities had he purchased under a fair sale, and gone into possession, or had a third person been the purchaser.

SUCH EQUITABLE DOCTRINES ARE TO BE SANCTIONED as, being consistent with the principles of law, will protect officers enforcing process under a void judgment, and will meliorate the harshness of the rule as to the effect of jurisdictional mistakes.

ACTION for recovery of a tract of land. The plaintiff and appellant claims under an execution and sale under a judgment of the supreme court, rendered on an appeal from a judgment of the district court which reversed a judgment of a justice of the peace in an action between the same parties. The judgment of the supreme court reversed the judgment of the district court, and affirmed the justice's judgment. The defendant and appellee claimed in his answer that the judgment of the supreme court was void, for the reasons stated in the opinion. The answer was sustained on exception, and the petition was dismissed.

A. J. Hamilton, for the appellant.

W. P. and T. H. Duval, for the appellee.

By Court, HEMPHILL, C. J. In support of the position that the judgment under which the sale was effected is a nullity, the appellee refers to the decision of this court in *Titus v. Latimer*, 5 Tex. 433, in which it was held that the district court had no power, by appeal, to take cognizance of judgments rendered in inferior jurisdictions, with the exception of judgments in inferior tribunals exercising jurisdiction in matters pertaining to the estates of deceased persons; and that the law vesting such appellate power in the district court was unconstitutional.

On the principles settled in this case it is very clear that the district court acted without authority in revising the magistrate's judgment upon its merits, and that the judgment of the supreme court was equally without authority. For if the district court or the court *a quo* had no power, the appellate court had none: *Aulanier v. The Governor*, 1 Tex. 653; *Baker v. Chisholm*, 3 Id. 157. And it is equally clear that this judgment without lawful power is a nullity, and can not be used as evidence in support of the title set up by the appellant: 2 Phill. Ev., Cowen & Hill's notes, 12.

The principle that a judgment of a court acting without authority is null seems to be of universal application. The only difference in its effect on the judgments of general and of specially limited jurisdictions is, that in support of the former, jurisdiction is presumed, while in the latter it must be shown; but whenever the want of power is made to appear, its legal effect is the same, whatever may be the character of the jurisdiction: 2 Phill. Ev., Cowen & Hill's notes, 206, 214, and the cases cited. The cases are numerous in which the effect of a want of authority is enunciated; and it is thus perspicuously stated in *Elliott v. Peirsol*, 1 Pet. 328-340: "Where a court has

jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them."

The appellant contends that a judgment of the supreme court having general appellate jurisdiction is conclusive, unless set aside before the expiration of the term, and that no court can look behind it; and in support of this position refers to the case of *Ex parte Watkins*, 3 Pet. 193. There are some strong expressions in the opinion as to the absolute conclusiveness of judgments by courts of general jurisdiction unless they be reversed on error or appeal. Whether they are reconcilable with other cases in the same tribunal, I shall not attempt to discuss. There are repeated recognitions in the opinions of that court of the general rule as to the legal consequence of the want of power, whether the jurisdiction be general or special. In *Voorhees v. The Bank of The United States*, 10 Id. 474, it is said in substance that the only difference between the supreme court and other courts is, that no court can revise the proceedings of the supreme court, but that that difference disappears after the time prescribed for a writ of error or appeal to revise those of an inferior court of the United States or of any state: they stand on the same footing in law. If not warranted by the constitution or law of the land, the most solemn proceedings of the supreme court can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice*, that is, by persons assuming the judicial function in the given case without lawful authority. In *Williamson v. Berry*, 8 How. 540, it was declared, in the opinion of the majority of the court, to be a "well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states: *Glass v. Betsey*, 3 Dall. 6; *Rose v. Himely*, 4 Cranch, 241; *Wilcox v. Jackson*, 13 Pet. 499; *Hickey v. Stewart*, 8 How. 750.

The rule thus stated is sufficiently broad to cover the judgments of all courts—unless, indeed, there be a court whose jurisdiction is unlimited.

Another position assumed by the appellant is, that it is no objection to his title that the law by which appeal was had from the justice's court, and final judgment in this court, was unconstitutional—or, in other words, that where a law, though unconstitutional, gives jurisdiction, the judgment is not a nullity. In support of this view, the case of *Webster v. Reid*, 1 Morr. 466, is cited. This case was revised on error in the supreme court of the United States, and the judgment of the lower court was totally reversed. The judgments which had been supported by the lower court were by the supreme court declared nullities; and it was also held that when a judgment was brought collaterally before the court as evidence, it may be shown to be void on its face, for the want of notice to the person against whom it is recovered, or for fraud.

The principles of law being exclusive against the validity of the judgment relied upon, we are of opinion that there was no error in overruling the exception to the defendant's answer and dismissing the petition.

In the case before the court, the plaintiff in the execution purchased the property sued for, but had not gone into possession. The facts of this case are not such as to authorize a discussion or decision relative to the equities which might have arisen, and the terms which might have been imposed, had the appellant, under a fair sale, gone into possession; or had a third person been the purchaser, and the appellee was by suit attempting recovery of the premises. Nor are we by this opinion precluded from sanctioning such equitable doctrines, consistent with the principles of law, as will protect officers enforcing process under a void judgment, and will meliorate the harshness of the rule as to the effect of jurisdictional mistakes: *Howard v. North*, 5 Tex. 315–317 [51 Am. Dec. 769]; *Savacool v. Boughton*, 5 Wend. 176, 177 [21 Am. Dec. 181]; *Dufour v. Camfranc*, 11 Mart. 610 [13 Am. Dec. 360]; *Blight v. Tbbin*, 7 T. B. Mon. 615 [18 Am. Dec. 219]; *McLaughlin v. Daniel*, 8 Dana, 183.

Judgment affirmed.

JURISDICTION PRESUMED IN FAVOR OF COURT OF GENERAL JURISDICTION, but it must be shown in case of an inferior court: *Reynolds v. Stansbury & Burch*, 55 Am. Dec. 459, and note citing prior cases; *Kenney v. Greer*, 54 Id. 439; *Borden v. State*. Id. 217.

JUDGMENT OF COURT HAVING NO JURISDICTION IS VOID: *Lovejoy v. Alber*, 54 Am. Dec. 630, and note citing prior cases; *Kenney v. Greer*, Id. 439, and note.

RIGHTS OF THIRD PERSONS ACQUIRED UNDER ERRONEOUS JUDGMENTS are not divested by a reversal thereof: See *McJilton v. Love*, 54 Am. Dec. 449, and note citing prior cases.

WHERE EXECUTION SALE HAS BEEN MADE ON INVALID EXECUTION issued on valid judgment, and there is no fraud, the purchaser will not be compelled to restore the property purchased until reimbursed the amount paid by him: *Howard v. North*, 51 Am. Dec. 769. The principal case is cited in support of this proposition in *Bailey v. White*, 13 Tex. 118; *Walker v. Myers*, 36 Id. 252; *Burns v. Ledbetter*, 54 Id. 384.

APPEAL CONFERS NO JURISDICTION THAT DOES NOT BELONG TO COURT A QUO: See *People v. Skinner*, 54 Am. Dec. 432; *Levy v. Sherman*, 42 Id. 690. The principal case is cited to this effect in *Billingsly v. State*, 3 Tex. App. 688; *Chambers v. Hodges*, 23 Tex. 110.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

BEALS v. OLNSTEAD.

[24 VERMONT, 114.]

VENDOR'S STATEMENTS SHOULD BE SUBMITTED TO JURY to determine whether they constitute a warranty of quality, unless it is apparent that they were understood by the parties at the time as amounting to nothing more than recommendations and matters of opinion merely, and the vendee was still left to understand that he must examine and judge for himself, and unless there is a fatal variance.

VENDOR'S STATEMENTS OUGHT TO BE REGARDED AS WARRANTY OF QUALITY, when they form the sole basis of the sale, there being no opportunity to examine the chattel, and no examination in fact attempted; when they are positively made with reference to matters upon which the vendor professes, and is supposed to have, knowledge; or when the chattel was bought for a particular use, and the vendor knew that the vendee would not buy an inferior article.

WARRANTY THAT CHATTEL IS FIT FOR PARTICULAR USE IS ORDINARILY IMPLIED, when it is sold for such a use.

DEFECTIVE DECLARATION SHOULD BE TAKEN ADVANTAGE OF by demurrer, or in arrest of judgment.

ASSUMPSIT on a warranty of hay. The promise and breach alleged in the declaration were that "the defendant undertook and promised plaintiff that said hay was cut and cured in good season, was good bright hay, and plaintiff then and there paid said defendant fifty-five dollars, and avers that said hay was not cut and cured in good season, but was wholly worthless." The defendant pleaded the general issue. It appeared from evidence given by the plaintiff on the trial that he called upon the defendant to see the hay offered for sale, and that the parties went to the barn where it was. The defendant offered to allow

the plaintiff to pull off a board from the barn to examine the hay, but the plaintiff replied that he could not tell by that, but informed the defendant that he wished it for the particular purpose of keeping his oxen during the spring and summer while at work on the railroad, and that the defendant knew whether or not his hay would answer that use. The defendant then said that his hay was good hay, well cured, and put into the barn in good order. The negotiation was continued for several days, nothing more being said as to the quality of the hay, when the bargain was closed. The plaintiff, when he came to get the hay, found it to be worthless, full of brakes, and not such as grew around the barn, and refused to take it. The plaintiff then asked the defendant if the latter had not said that the hay was good hay, cut early, and cut around the barn, and got in in good order, to which the defendant replied, "I did, and say so now," The court thereupon directed a verdict for the defendant, and the plaintiff excepted.

Stevens and Edson, for the plaintiff.

H. R. Beardsley, for the defendant.

By COURT. In regard to the general merits of this case, the principles which must govern are too well settled to require much discussion.

As to whether the defendant's assertions in regard to the quality of the hay were understood to form the basis of the contract, there could be but one opinion. The plaintiff declined to examine the hay, saying he could tell nothing about it. He expressly informed the defendant he wanted it for a particular use, to feed his oxen in spring and summer while at work upon the railroad, and that he must have such hay as would answer that use. The defendant then proceeded to make a statement in regard to the hay, which brought the quality of the hay within the *desideratum*. And after the negotiation had continued some days, nothing more being said between the parties in regard to the quality of the hay, the trade was closed, and plaintiff paid for the hay, as the declaration states, and no question is made upon this point. It is scarcely possible to suppose a case where it is more absolutely certain that the defendant's statements formed the sole basis of the sale than the present, and in such case the declaration is ordinarily to be regarded as a warranty.

As to how far statements made by the vendor are to be regarded as an express warranty, every case must depend very much upon its own circumstances. And unless it is apparent

that defendant's statements in regard to the quality of the hay were understood by the parties, at the time, as amounting to nothing more than recommendations of the goods, and were matters of opinion merely, and the plaintiff was still left to understand that he must examine and judge for himself, the case should be submitted to a jury, unless there is a fatal variance.

There is very much in the present case to show that defendant's statements ought to be regarded as a warranty.

1. They were understood by both parties as forming the basis of the contract of sale, there being no good opportunity to examine the goods, and none in fact attempted; 2. They were in regard to matters upon which the defendant was supposed and professed to have personal knowledge, and what he said he asserted positively; therefore he ought to expect to be bound by it; 3. The hay was bought for a particular use, and the defendant knew plaintiff would not buy an inferior article. The sale of the hay, then, for this particular use ordinarily implies a certainty that it is fit for the use.

The mere assertion that hay is good hay certainly implies nothing more than was found in this case; but good hay for the particular use, cut and cured well, in good season, is sufficiently definite, one would think.

We think the breach alleged is sufficiently broad. It is even broader than the promise alleged. But the plaintiff must, of course, be confined to the breach of the contract alleged. And that seems to us to afford a very considerable range under the proof stated.

Judgment reversed, and case remanded.

If the declaration is defective, that question should be made upon demurrer or in arrest of judgment.

WARRANTY CONSTITUTED BY EXPRESS AFFIRMATION OF FACT, as distinguished from matter of opinion or belief: *Chapman v. Murch*, 10 Am. Dec. 227; *Osgood v. Lewis*, 18 Id. 317; *Towell v. Gatewood*, 33 Id. 437; *Kinley v. Fitzpatrick*, 34 Id. 108. It must appear that the affirmation was intended as a warranty: *Erwin v. Maxwell*, 9 Id. 602; *Swett v. Colgate*, 11 Id. 266. But no particular form of words is necessary: *Chapman v. Murch*, 10 Id. 227; *Beeman v. Buck*, 21 Id. 571; *Towell v. Gatewood*, 33 Id. 437; *Kinley v. Fitzpatrick*, 34 Id. 108.

WARRANTY OF QUALITY, WHETHER CAN BE IMPLIED: See *Moses v. Mead*, 43 Am. Dec. 676, and prior cases in note; *Mixer v. Coburn*, 45 Id. 230; *Kingsbury v. Taylor*, 50 Id. 607; *Dickson v. Jordan*, 53 Id. 403.

WARRANTY, WHETHER IMPLIED THAT CHATTEL IS FIT FOR PARTICULAR USE FOR WHICH IT WAS PURCHASED: See *Carnochan v. Gould*, 19 Am. Dec. 666; *Ricketts v. Sisson*, 35 Id. 141; *Scott v. Renick*, Id. 177; *Brenton v. Davis*, 44

Id. 763; note to *Emerson v. Brigham*, 6 Id. 115, where the principal case is cited. In *Rodgers v. Niles*, 11 Ohio St. 54, the principal case is cited as illustrating the vendor's liability on an implied warranty in the case of articles sold for a particular purpose; and in *Pacific Iron Works v. Newhall*, 34 Conn. 77, it is cited to the point that the sale of an article, purchased for a particular purpose, communicated at the time to the vendor, implies a warranty that the article shall be reasonably fit for and shall answer the object for which it was purchased.

DEFECTIVE DECLARATION TO BE TAKEN ADVANTAGE OF BY DEMURRER: *Bank of Columbia v. Magruder*, 14 Am. Dec. 271; *Martin v. Webb*, 39 Id. 363; or by way of exceptions to the admissibility of evidence at the trial: *Bank of Columbia v. Magruder*, *supra*.

BURTON v. STEVENS.

[24 VERMONT, 131.]

BAR OF STATUTE OF LIMITATIONS IS REMOVED, and the defendant is technically estopped from setting up the defense of the statute, where, more than six years after certain notes were made by him, he signed an agreement on the back of the notes, to the effect that he would "not take any advantage of the statute of limitations on the within two notes."

ASSUMPSIT on promissory notes. The facts are stated in the opinion. Judgment was rendered for the plaintiff for the amount of the notes, with interest and costs, deducting the indorsements and a balance due on book-account, as reported by the auditor. Exceptions by the defendant.

H. R. Beardsley, for the plaintiff.

H. G. Edson, for the defendant.

By Court, ISHAM, J. The plaintiff has brought his action upon two promissory notes dated March 2, 1832, executed by the defendant to the plaintiff, and to which the defendant has pleaded the statute of limitation, that the cause of action did not accrue within six years, and upon which issue is joined.

The evidence upon which the plaintiff relies to remove this statute bar is the agreement entered on the back of the notes, signed by the defendant under the date of August 19, 1841, in these words: "I hereby agree that I will not take any advantage of the statute of limitations on the within two notes." It is claimed by the defendant that this writing is not sufficient to revive the debt. That it contains no acknowledgment that it is due, or a promise to pay, and that an acknowledgment, to take a case out of the statute of limitations, must contain an unqualified and direct admission of a present subsisting debt, and from which a promise to pay the same can be found.

It is evident that in making that agreement the defendant intended to place in the hands of the plaintiff sufficient evidence to protect his claim from the operation of the statute, and that the plaintiff in taking this agreement supposed that his claim was saved thereby from its operation. It is just and reasonable, therefore, that such an effect should be given to this agreement, if it can be consistent with established rules of law. The language of Lord Denman in the case of *Gardner v. McMahon*, 43 Eng. Com. L. 870, has a direct application to this case: "That it may well be supposed that the creditor on his part has forbore to sue, relying upon this undertaking as preserving his right of action in future." It is equally to be presumed that the creditor, in the same reliance, has permitted to pass from his possession the evidence to prevent the operation of the statute, which he might have controlled previous to the execution of that agreement. The defense, if available, is a violation of the defendant's agreement, and we entertain no doubt that he is concluded thereby. In the case of *Paddock v. Colby*, 18 Vt. 485, the defendant used this language, "That he had assured the plaintiff that he would not take advantage of the statute of limitations," and the court held that the claim was saved from its operation. In the case of *The Utica Insurance Co. v. Bloodgood*, 4 Wend. 652, the defendant signed a written agreement in these words: "I hereby agree not to plead the statute of limitation," etc., and Sutherland, J., said: "The defendant is estopped by his stipulation from availing himself of the statute of limitations." These authorities are satisfactory upon the effect that should be given to the writing upon the back of the notes, for it is an agreement by the defendant that the notes shall be placed upon the same footing as if the statute had not run on the claims, the notes then furnishing the evidence of the debts and the promise to pay.

The admission of this testimony is objected to under the issue as formed in this case; and if the writing has the effect to prevent the operation of the statute, it is claimed that it should have been replied by way of estoppel, as intimated in the case of *Allen v. Webster*, 15 Wend. 289.

Whether it is proper evidence under this issue depends upon the construction which should be given to the words so written, and whether they contain an express or implied acknowledgment that the debt is due, and a willingness on the part of the defendant to pay it. If with this writing there had been a protestation that the claim was unjust, the statute would prevail, as was de-

cided in *Carruth v. Paige*, 22 Vt. 180; *Allen v. Webster*, 15 Wend. 284; and *Phelps v. Stewart*, 12 Vt. 256; as there would be wanting evidence of a willingness and promise to pay on the part of the defendant. But where the writing is unconditional in its terms, and unaccompanied by any such protestations, then it does contain such an acknowledgment, and affords evidence of such a promise as will prevent the operation of the statute under this issue.

In the case of *Gardner v. McMahon*, *supra*, we find a construction given to similar language. Lord Denman, C. J., says that when the debtor uses the language, "I will waive the statute," it contains an acknowledgment of the debt and a promise to pay. Patterson, J., says that these words, standing alone, make a promise, and will avoid the statute of limitation; and with this construction Williams and Wightman, JJ., agreed. And it is to be observed that this evidence was received under the same issue as formed in this case.

The construction thus given to this writing, and which we feel disposed to adopt, disposes of the question made in this case, that the writing is ineffectual, being made after the statute had run on the notes. For if the debtor by any language acknowledges the debt, and expresses a willingness to pay it, the debt is revived, though the statute has run on the claim. We think, also, that the defendant is technically estopped by this agreement from making this defense.

The result is, that the judgment of the county court must be affirmed.

ACKNOWLEDGMENT, WHEN SUFFICIENT TO REMOVE BAR OF STATUTE OF LIMITATIONS: See *Glenn v. McCullough*, 18 Am. Dec. 661; *Olcott v. Scales*, 21 Id. 585; *Frey v. Kirk*, 23 Id. 581, and notes to these cases; *Austin v. Bostwick*, 25 Id. 42; *Newlin v. Duncan*, Id. 66; *Johnson's Adm'r v. Bounethea*, 30 Id. 347; *Elliott v. Leake*, 32 Id. 314; *Sutton v. Burruss*, 33 Id. 246; *Rainey v. Link*, 40 Id. 411; *Dabney's Ex'rs v. Dabney's Adm'r*, Id. 761; *Mumford v. Freeman*, 41 Id. 532; *Coles v. Kelsey*, 47 Id. 661. The principal case is cited in *Stearns v. Stearns*, 30 Vt. 682, to the point that an agreement not to take advantage of the statute of limitations is an acknowledgment of the debt sufficient to take it out of the statute.

BIGELOW v. WALKER.

[24 VERMONT, 149.]

PLEDGE IS PROPER PARTY TO CALL FACTOR TO ACCOUNT, where he receives the goods with the understanding that he should dispose of them through a factor, and credit the debtor with the amount of sales, and he accordingly commits them to a factor, from whom he takes a receipt.

FACTOR IS TO SELL FOR FAIR VALUE OR MARKET PRICE in the absence of special directions, and if he sells or falsely accounts at an underprice, he is liable to make additional compensation for the property.

AMOUNT DUE FROM FACTOR IS IN NATURE OF FUND PROVIDED FOR PLEDGEE'S BENEFIT by the pledgor, and which the pledgee is not at liberty to wholly disregard, and claim the entire balance of his debt as if no means of satisfaction had ever been at his command, where he has the superior right to pursue the fund by virtue of an understanding that the goods received by him should be disposed of through a factor, and the debtor credited with the amount of sales.

BOOK-ACCOUNT. Judgment to account was rendered in the county court, and an auditor appointed. If appears that the defendant was indebted to the plaintiffs, and the latter received goods from the former upon an agreement set forth in the opinion. The defendant claimed a certain offset, also stated in the opinion. Judgment was rendered upon the auditor's report for the plaintiffs. Exceptions by the defendant.

E. N. Briggs, for the defendant.

J. Prout and E. D. Barber, for the plaintiffs.

By Court, ROYCE, C. J. Several questions were presented by the auditor's report in this case which are now waived; and the only matter at present in controversy is a claim on the part of the defendant to be allowed the amount of his charge for two hundred and four yards of cloth, or a sum considerably larger, at least, than the amount credited by the plaintiffs for the proceeds of the same cloth.

The defendant insisted before the auditor that the cloth was delivered to the plaintiffs upon a direct sale at its market value. But such a sale is negatived by the report; and the defendant's claim must depend upon the arrangement for effecting a sale of the property through the agency of Bush & Wilds. The contract on that subject is neither fully nor distinctly stated in the report, and much is left to implication and inference from the facts detailed. It is apparently of no importance that the commission house of Bush & Wilds was selected or suggested by the defendant. That circumstance could not affect the measure

of their accountability, nor would it show with which of these parties they really contracted. Were a loss to be borne in consequence of their insolvency, the fact might then become important.

So far as the auditor attempts to describe the contract, the substance of his finding is that the plaintiffs were to account for the cloth, by crediting the defendant with the amount of sales to be received from Bush & Wilds, deducting their commission. But it might happen that, by making improper sales, or by misrepresenting the sales made, those persons would become justly answerable beyond the amount reported by them to the plaintiffs. In that event the plaintiffs would not realize as large a payment as they should receive, nor would the defendant get the proper equivalent for his goods. And if the plaintiffs should merely credit the defendant, in such a case, with the amount so reported and paid over, they would not account to him for the property in that true and just sense which the parties must have intended. Hence it is apparent that the mode adopted for accounting, as between the plaintiffs and defendant, was based upon the assumption that the factors would fully and properly discharge their duties. And should they violate their duty, so that full justice could not be done to the defendant, by simply giving him credit in the manner contemplated, the question would then arise, which of these parties should resort to the factors for a further and more just accounting.

We make no question but that the defendant as general owner of the property might in such case enforce a remedy of some kind against them; and yet, as the facts of this case appear, we think the plaintiffs would more properly be the parties to call them to account. They would certainly have all the power required for that purpose. For although we are not to understand that they became the owners of the cloth by purchase, they nevertheless acquired an interest in it, as the means from which to realize a speedy payment upon their debt. They received it substantially as a pledge, with the right of immediate sale. They committed it to the factors to be sold, taking their receipt for it. And as the plaintiffs did this in their own name, and with the defendant's assent, they became invested with the paramount right, as between themselves and the defendant, to require of the factors a full and just accounting. And we think it should be inferred that they were to exercise that right for the benefit of themselves and the defendant, unless there was some express stipulation to dispense with active diligence on

their part, or unless their debt should be otherwise satisfied. Perhaps they might also be excused by seasonable notice to the defendant of the account of sales furnished by Bush & Wilds, and an offer to relinquish in his favor all further claim against them. At present there is nothing in the case to repel the inference of this obligation on the part of the plaintiffs. The only express contract of the factors which appears was with the plaintiffs; and the defendant had a right, for aught that the case discloses, to insist that a due performance of that contract should be required. We therefore conclude that the plaintiffs have been and still are the proper parties to resort to the factors.

It only remains to inquire whether Bush & Wilds have sufficiently accounted. And it is manifest that they have not, if we take the value and selling price of such cloth to have been as found by the auditor. Those persons are nowhere spoken of as auctioneers, but only as commission merchants or factors. And, in the absence of special directions as to price, a factor is to sell for the fair value or market price: *Smith's Com. Law*, 105; *Paley on Agency*, 26. The cloth in question is found to have been worth, when committed to the factors for sale, eighty-seven and one half cents per yard, as tested by the sales of cloth of like quality and description in the markets of Boston and New York. But the account of Bush & Wilds, as rendered to the plaintiffs, would represent the sale of this cloth at about one half of that price. And hence the necessary inference would seem to be that they acted in utter disregard of their duty as factors, by selling at such an underprice, or that they rendered a false and fraudulent account of the actual sales. In either case justice would require that they be compelled to make an additional compensation for the property. Now, whatever amount is rightfully due from them may well be considered in the nature of a fund provided by the defendant, to be applied in satisfaction of his indebtedness to the plaintiffs. And as the plaintiffs appear to have always had the superior right to pursue that fund, we think they were not at liberty to wholly disregard it, and claim the entire balance of their debt, as if no such means of satisfaction had ever been at their command. The judgment of the county court is therefore reversed. And the cause will be recommitted to the auditor, to ascertain what further allowance, if any, should be made to the defendant.

FACTORS, DEFINITION AND DISTINCTIVE FEATURES.—Perhaps the best definition of a factor is that given by Mr. Wharton: "A factor is a specialist em-

ployed to receive and sell goods for a commission:" Whart. on Agency, sec. 735. He is also defined to be "an agent employed to sell goods or merchandise consigned to him by or for his principal, for a compensation commonly called factorage or commission:" Story on Agency, sec. 33; Bouv. Law Dict., tit. Factor. But he must be, as Mr. Wharton says, a "specialist," pursuing the particular business as a trade, and not undertaking out of his line of business to sell a piece of goods on commission. Pollock, C. B., in *Whitfield v. Brand*, 16 Mee. & W. 282, 288, says that "as soon as it appears to be a branch of a party's business to sell the goods of others on commission, that establishes him to be a factor." See also a very faulty definition, including many other kinds of agents within its terms, given in *Ward v. Brandt*, 13 Am. Dec. 352; and see *Blood v. Palmer*, 26 Id. 547; Cal. Civ. Code, sec. 2026. The distinctive features of a factor are, then—1. He must pursue the business of receiving and selling goods as a trade or following; 2. The goods must be received either in bulk or sample into his possession; 3. There must be a power to sell; 4. The work is undertaken for a commission, although in exceptional cases remuneration may be made in some other way; 5. A factor is generally resident in some other place than his principal: Whart. on Agency, sec. 735. The difference between factors and brokers has been thus pointed out in *Baring v. Corrie*, 2 Barn. & Ald. 137, 143, by Abbott, C. J.: "Now, the distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not to be trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name." See also the remarks of Mr. Justice Holroyd, quoted in McCulloch's Commercial Law Dict., tit. Factor.

FACTOR'S DUTY TO OBEY INSTRUCTIONS.—As a general rule, factors, like other agents, must obey the instructions of their principals: Paley on Agency, 25; Whart. on Agency, sec. 758; *Smart v. Sanders*, 5 Man. G. & S. 895; *De Comas v. Prost*, 3 Moo. P. C. 158; *Bliss v. Arnold*, 30 Am. Dec. 467; *Howatt v. Davis*, 7 Id. 681; *Williams v. Littlefield*, 12 Wend. 362; *Evans v. Root*, 7 N. Y. 186; *Scott v. Rogers*, 31 Id. 676; *Day v. Crawford*, 13 Ga. 508; *Copes v. Phelps*, 24 La. Ann. 562; *Weed v. Adams*, 37 Conn. 378; *Johnson v. Wade*, 2 Baxt. 480; *Strong v. Stewart*, 9 Heisk. 137; *Maxwell v. Audinwood*, 15 Hun, 111; *Marshall v. Williams*, 2 Biss. 255. These instructions are generally given in reference to the time and manner of sale, but the rule applies equally to other directions by the principal to the factor. Thus if the factor is instructed to insure the goods, it is his duty to obey: *De Tastett v. Crousillat*, 2 Wash. 132; *Shoenfeld v. Fleisher*, 73 Ill. 404.

In *Clark v. Van Northwick*, 1 Pick. 343, it is held that a factor having orders to sell for cash may, according to usage, sell on short credit; but this proposition is justly denied by other cases: *Hall v. Storrs*, 7 Wis. 253, 260; *Barksdale v. Brown*, 1 Nott & McC. 517. In extraordinary emergencies, however, a factor is permitted to deviate from his instructions in order to protect his principal: *Joslin v. Cowee*, 52 N. Y. 90, 95; and an order to a factor to sell at once, accepting a certain offer, will not authorize him to sell upon credit to a party known to him to be irresponsible: *Durant v. Fish*, 40

Iowa, 559. It is held that a factor with orders not to sell below a certain price is not liable for a sale at a lower price, where a higher price than that at which the sale was made could not have been obtained at any time between the time of sale and the inception of the suit, and if, in addition, the sale made was rather to the advantage than to the detriment of the principal: *George v. McNeill*, 26 Am. Dec. 498. A question of more difficulty arises where factors, who have received instructions not to sell below a certain price, have made advances on the goods and wish to sell in order to protect themselves. This single fact that they have made advances will not authorize them to sell for a less price than that fixed by their principals: *George v. McNeill*, *supra*; but it is settled that the factors may sell upon notifying their principals to repay the advances within a reasonable time: Whart. on Agency, sec. 758; *Blot v. Boiceau*, 51 Am. Dec. 345; *Marfield v. Goodhue*, 3 N. Y. 62; *Milliken v. Dehon*, 27 Id. 364; *Hilton v. Vanderbilt*, 82 Id. 391; *Brown v. McGran*, 14 Pet. 479; *Field v. Farrington*, 10 Wall. 141; *Porter v. Patterson*, 15 Pa. St. 229; *Whitney v. Wyman*, 24 Md. 131; *Parker v. Brancker*, 22 Pick. 40; *Frothingham v. Everton*, 12 N. H. 239; *Mooney v. Musser*, 45 Ind. 115; *Beadles v. Hartmus*, 7 Baxt. 476; *Bell v. Hannah*, 3 Id. 47; *Hornsby v. Fielding*, 10 Heisk. 367; *Cotton v. Hiller*, 52 Miss. 7; but this right is denied by the English cases of *Smart v. Sandars*, 5 Man. G. & S. 895; *De Comas v. Prost*, 3 Moo. P. C. 158. It is another matter, however, where a factor is directed to sell, and it is manifest or reasonably probable that upon the terms his security will be impaired or he will be prejudiced thereby. In such a case he may lawfully disregard his instructions: *Weed v. Adams*, 37 Conn. 378; *Butterfield v. Stephens*, 59 Iowa, 596; *Howland v. Davis*, 40 Mich. 545; *Blair v. Childs*, 10 Heisk. 199. The conduct of the factor in disobeying his instructions may of course be ratified, either expressly or impliedly, by the principal. Thus where a principal is informed of a sale at a less rate, but makes no objections, and draws the entire proceeds of the sale, the principal thereby ratifies the sale, and can not hold the factor responsible for a loss suffered: *Meyer v. Morgan*, 51 Miss. 21; S. C., 24 Am. Rep. 617; and the receiving without objection accounts of sales made on credit is a waiver of previous instructions to sell for cash; and the factor may afterwards presume that he has a right to make further sales on credit: *Marshall v. Williams*, 2 Biss. 255. The measure of damages where a factor sells at less than the specified price is the actual damage sustained by the principal, and if no actual loss appears to have been incurred, only nominal damages can be recovered: *Blot v. Boiceau*, 51 Am. Dec. 345, 349; *Frothingham v. Everton*, 12 N. H. 239; *Hinde v. Smith*, 6 Lana. 464; *Dalby v. Stearns*, 132 Mass. 230; and see *George v. McNeill*, 26 Am. Dec. 498. In *Fordyce v. Peper*, 16 Fed. Rep. 516, where a factor failed to obey orders to sell at a certain time, it was held that the measure of damages was the difference between the price at the time when the factor sold and the time when he was authorized to sell; while in *Whelan v. Lynch*, 60 N. Y. 469, the measure of damages was held to be the market value of the goods at the time of the receipt of the order, or within a reasonable time thereafter to be allowed for sale; and a charge allowing the highest market price between the time of the receipt of the order and that of the commencement of the action was therefore erroneous. It is well to observe that as far as third persons are concerned, the authority of factors acting in the line of their employment can not be limited by private instructions not known to such parties dealing with them: *Lobdell v. Baker*, 35 Am. Dec. 358.

FACTOR'S DUTY TO ACT IN GOOD FAITH, WITH REASONABLE CARE AND

DILIGENCE, ETC.—A factor in the discharge of his duties is bound to act in good faith towards his principal: See Story on Agency, sec. 186; *Clarke v. Tipping*, 9 Beav. 284; *Evans v. Potter*, 2 Gall. 12; *Babcock v. Orbison*, 25 Ind. 75. He will not be allowed to become the purchaser of his principal's goods: Whart. on Agency, sec. 760; *Wadsworth v. Gay*, 118 Mass. 44; but the principal may if he elects treat the sale as valid, and maintain an action for goods sold and delivered against the factor as purchaser: Id. Nor can a factor act as agent both for the seller and buyer: *Bensley v. Moon*, 7 Ill. App. 415, 421. Nor can he deny his principal's title: Whart. on Agency, sec. 761; he is bound to assume that his principal is the owner of the goods, and his allegiance is alone due to his principal: *Barnard v. Korbe*, 54 N. Y. 516. A factor is bound not only to act in good faith but to use reasonable care, diligence, and prudence in his employment, being liable for the want of its exercise in this degree, but no further: Story on Agency, sec. 186; *Van Alen v. Vanderpool*, 5 Am. Dec. 69; *Howatt v. Davis*, 7 Id. 681; *Folsom v. Mussey*, 23 Id. 522; *Greeley v. Bartlett*, 10 Id. 54; *Burrill v. Phillips*, 1 Gall. 360; *Evans v. Potter*, 2 Id. 12; *Leverick v. Meigs*, 1 Cow. 645; *Babcock v. Orbison*, 25 Ind. 75; *Phillips v. Moir*, 69 Id. 155; *Deshler v. Beers*, 32 Ill. 368; *Chandler v. Hogle*, 58 Id. 46; *Ernest v. Stotter*, 5 Dill. 438; *Atkinson v. Burton*, 4 Bush, 299; *Francis v. Castleman*, 4 Bibb, 282; *McCants v. Wells*, 3 S. C. 569. Mr. Wharton, in speaking of the diligence a factor must use, says: "The diligence required is not such as an exceptional business man may occasionally show, but such as good business men are as a class accustomed to show. Here we fall back upon usage as molding the duties of agents of this class. That diligence which good business men of their order and place are accustomed to apply, they must apply. They are required to apply no more, but they are liable for any loss occurring from their applying less:" Whart. on Agency, sec. 779; see also *Deshler v. Beers*, 32 Ill. 368; but in *Foster v. Waller*, 75 Id. 464, he is said to be held to a "high degree of vigilance" in learning the pecuniary ability of the purchaser where he makes a sale on change. A factor is not liable for an error in judgment where his instructions give him a discretion as to selling; *Milbank v. Dennistoun*, 21 N. Y. 386. Where he is guilty of fraud or gross negligence in the conduct of his principal's business, he forfeits all claim to commission or other compensation for his services: *Fordyce v. Peper*, 16 Fed. Rep. 516. It is also the duty of a factor to keep the property of his principal unmixed with that of his own and others: *Clarke v. Tipping*, 9 Beav. 284. And where a factor takes a bond for a debt due to him for the goods sold, and includes in the same instrument a debt due to himself, he is answerable to the principal for the amount of the goods, as he thereby deprived the principal of the means of pursuing the vendee by extinguishing the debt due by simple contract for the sale of the goods: *Jackson v. Baker*, 6 Cow. 394.

FACTOR'S DUTY TO ACCOUNT.—It is a factor's duty to keep and render true accounts to his principal of the dealings between them: Story on Agency, secs. 203, 204 a; *Clarke v. Tipping*, 9 Beav. 284; *Terwilliger v. Beals*, 6 Lans. 403. But it seems that an action will not lie against a factor for not accounting until after a demand made for an account: *Topham v. Braddick*, 1 Taunt. 572; *Cooley v. Betts*, 24 Wend. 203, where the cases of *Clark v. Moody*, 17 Mass. 145, and *Dodge v. Perkins*, 9 Pick. 368, taking an opposite view, are criticised. Where a factor knowingly transmits to his principal a grossly false and fraudulent account of sales, and does not enter the sales on his books until months after they are made, and then enters them falsely, no credit will be given the factor or his books: *Fordyce v. Peper*, 16 Fed. Rep. 516.

But accepting the factor's final account without objection discharges him from all further liability to account for sales made by him on a credit, the proceeds of which he has not collected: *Rion v. Gilly*, 12 Am. Dec. 483.

DELEGATION OF AUTHORITY BY FACTOR.—A factor being selected for his skill and discretion can not ordinarily delegate his authority: Story on Agency, sec. 13; Whart. on Agency, sec. 756; *Catlin v. Bell*, 4 Camp. 183; *Solly v. Rathbone*, 2 Mau. & S. 298; *Cockran v. Irlam*, Id. 401, note; *Schmaling v. Thomlinson*, 6 Taunt. 147; *Loomis v. Simpson*, 13 Iowa, 532; *Campbell v. Reeves*, 3 Head, 226; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. 520; and see Cal. Civ. Code, sec. 2368, subd. 3. But authority may be expressly conferred upon him to employ a subagent; or it may be impliedly conferred in cases of necessity, in cases where the nature of the business requires it, and the like, as with other agents: See *Loomis v. Simpson*, 13 Iowa, 532; *McMorris v. Simpson*, 21 Wend. 610; *Campbell v. Reeves*, 3 Head, 226; *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. 520; *Grieff v. Couguill*, 2 Disney, 58, 60. In *Gage v. Allison*, 2 Am. Dec. 682, it is held that executors of a factor can not sell goods, but may retain them for his lien.

FACTOR'S POWERS DEFINED BY USAGE.—As in the case of brokers, the extent of a factor's powers may be defined by usage: Whart. on Agency, sec. 738; *Randall v. Kehler*, 60 Me. 37; *Johnston v. Usborne*, 11 Ad & El. 549; *Kauffman v. Beasley*, 54 Tex. 563; and see *Bayliffe v. Butterworth*, 1 Ex. 425; *Moxted v. Paine*, L. R., 4 Ex., 81; *Duncan v. Hill*, Id., 6 Ex. 255; *Graves v. Legg*, 2 H. & N. 210. Thus in *Johnston v. Usborne*, *supra*, it was held admissible to show that by custom a factor was warranted in selling in his own name by instructions to sell on account of his principal. But it is said that usage will not relieve a factor from a duty or liability which the law would otherwise impose upon him, unless he shows the principal had, or ought to have had, knowledge of such usage, or consented to that mode of doing business: *Duguid v. Edwards*, 50 Barb. 290; *Farmers' and Mechanics' Nat. Bank v. Sprague*, 52 N. Y. 605; but see *Bayliffe v. Butterworth*, 1 Ex. 425, *per Parke and Rolfe*, BB.

MANNER, TIME, AND PLACE OF SALES BY FACTORS.—It seems to have been the formerly admitted rule that a factor must sell for cash in the absence of instructions to the contrary: Paley on Agency, 26; 2 Kent's Com. 622; Whart. on Agency, sec. 740; *Barton v. Sadock*, 1 Bulst. 103, 104; *Anonymous*, 12 Mod. 514; but it is now settled that he may sell in accordance with the usages of trade, either for cash or on credit, being held to the exercise of reasonable care in credit sales: Paley on Agency, 26; 2 Kent's Com. 622; Story on Agency, sec. 209; Whart. on Agency, sec. 740; *McConico v. Curzen*, 1 Am. Dec. 540; *James v. McCredie*, Id. 617; *Van Alen v. Vanderpool*, 5 Id. 192; *Goodenow v. Tyler*, Id. 22; *Greely v. Bartlett*, 10 Id. 54; *Leverick v. Meigs*, 1 Cow. 645; *Robertson v. Livingston*, 5 Id. 473; *Leland v. Douglass*, 1 Wend. 490; *Byrne v. Schwing*, 6 B. Mon. 199, 201; *Hapgood v. Batcheller*, 4 Met. 573, 576; *Daylight Burner Co. v. Adlin*, 51 N. H. 56, 59; S. C., 12 Am. Rep. 45; *Burton v. Goodspeed*, 69 Ill. 237; *Given v. Lemoine*, 35 Mo. 110; *Scott v. Surman*, Willes, 400, 407; *Houghton v. Matthews*, 3 Bos. & Pul. 485, 489; see also Cal. Civ. Code, sec. 2368, subd. 2. There may, however, be a usage to sell for cash only, and in such cases a factor can not sell on credit: *Harbert v. Neill*, 49 Tex. 143; *Neill v. Billingsley*, Id. 161; *Kauffman v. Beasley*, 54 Id. 563; and see *Burton v. Goodspeed*, 69 Ill. 237; *Daylight Burner Co. v. Adlin*, 51 N. H. 56, 59; S. C., 12 Am. Rep. 45. A factor in the exercise of due prudence may take the vendee's negotiable note in payment without rendering himself liable in case of the maker's subsequent insolvency, and this may be made payable

to himself: *Goodenow v. Tyler*, 5 Am. Dec. 22; *Greely v. Bartlett*, 10 Id. 54; *Leach v. Beardsley*, 22 Conn. 404, 410; *Scott v. Surman*, Willca, 400; and a factor who takes a promissory note for goods sold on account of his consignor, and gives him reasonable notice of this and of the subsequent insolvency of the purchaser, does not by proving the note under the insolvent laws, and taking a dividend thereon, render himself liable for the full amount of the note if he uses reasonable care and skill, although the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the discharge in insolvency: *Gorman v. Wheeler*, 10 Gray, 362; but a factor is bound to use due diligence in the collection of a note which he receives in the due course of business: *Folsom v. Mussey*, 23 Am. Dec. 522. It was however held in *Hosmer v. Beebe*, 2 Mart., N. S., 368, that a factor can not at the expiration of credit given take a note payable to himself at a future day; by so doing, he makes the debt his own. A factor will likewise not be permitted to take notes in his own name, and discount them for his own accommodation; in the event of the insolvency of the purchaser, the factor will be responsible for the amount of the sales: *Myers v. Entriken*, 40 Am. Dec. 538; *Johnson v. O'Hara*, 5 Leigh, 456. A factor, like any other agent to sell, has undoubtedly the power to do whatever is necessary and usual to effect the sale: Whart. on Agency, sec. 739; Story on Agency, sec. 97; thus where a warranty is usual, a factor may give a warranty: *Id.*; *Randall v. Kehler*, 60 Me. 37; *Andrews v. Kneeland*, 6 Cow. 354. But a factor can not bind his principal by submitting to arbitration a claim for damages arising out of an alleged breach of implied warranty of quality of the thing sold: *Carnochan v. Gould*, 19 Am. Dec. 668.

With reference to the time of sale, it is held that factors are required to sell property consigned to them within a reasonable time after its receipt, unless otherwise directed: *Atkinson v. Burton*, 4 Bush, 299; and this is undoubtedly the true rule, under ordinary circumstances; and in regard to the place of sale, it is maintained that where a consignment is made to a factor, unaccompanied with any instructions from the principal, in the absence of established usage of trade to the contrary, it may be presumed that the produce is intended to be sold at the residence of the factor: *Phillips v. Scott*, 43 Mo. 86. But in *Grieff v. Cowguill*, 2 Disney, 58, the court doubted whether usage could change the rule requiring factors to sell at their place of residence; and see *Kauffman v. Beasley*, 54 Tex. 563. The case of *Wallace v. Bradshaw*, 6 Dana, 382, holds, however, that factors may, by custom, send goods to other places for sale.

POWER OF FACTOR TO BARTER.—The power of a factor being limited to selling, by bartering his principal's goods no title passes. In such a case the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant that he had been dealing with a factor only: *Guerreiro v. Peile*, 3 Barn. & Ald. 646; Whart. on Agency, sec. 744; and see Cal. Civ. Code, sec. 2368, subd. 2. And as to the power of an agent to barter under the factors' acts, see *Victor etc. Co. v. Heller*, 44 Wis. 265.

POWER OF FACTOR TO PLEDGE.—1. *At Common Law.*—At the English common law the power of a factor to pledge his principal's goods in any case was extremely doubtful. It is certain that he could not pledge for debts due himself, or advances made on his account; and although Mr. Justice Story asserts that he could pledge the goods for advances made on account of his principal, or for advances made to himself to the extent of his own lien, and for the payment of duties and other charges on the goods, and for charges

and purposes allowed or justified by the usages of trade: Story on Agency, sec. 113; this is very questionable, although it must be admitted there are decisions which seem to sustain his view: See Whart. on Agency, sec. 748; *Patterson v. Tash*, 2 Stra. 1178; *Daubigny v. Duval*, 5 T. R. 604; *Newsom v. Thornton*, 6 East, 17; *Graham v. Dyster*, 2 Stark. 21; *Pickering v. Burk*, 15 Id. 38; *Martini v. Coles*, 1 Mau. & S. 140; *Shipley v. Kymer*, Id. 484; *Solly v. Rathbone*, 2 Id. 298; *Cockran v. Irlam*, Id. 301, note; *Boyson v. Coles*, 6 Id. 14; *Fielding v. Kymer*, 2 Brod. & B. 639; *Queiroz v. Truman*, 3 Barn. & Cress. 342; *Bonito v. Mosquera*, 2 Bosw. 401, 413, 414. But see *Pultney v. Keymer*, 3 Esp. 182; *Williams v. Barton*, 3 Bing. 139. In such cases of attempted pledges, while the factor himself was guilty of conversion, as against the third person, the principal was not bound, although such person treated with the factor without notice that he was dealing for another. The case of *Daubigny v. Duval*, 5 T. R. 604, holds, however, that if a factor pledge the goods of his principal, the latter may recover their value in trover against the pledgee on tendering to the factor what is due to him, without any tender to the pledgee. In the United States, independent of the factors' acts, the rule is well settled that a factor can not pledge his principal's goods to secure his own debt: *Bott v. McCoy*, 56 Am. Dec. 223; *Van Amringe v. Peabody*, 1 Mason, 440; *Evans v. Potter*, 2 Gall. 12; *Warner v. Martin*, 11 How. 209; *Kennedy v. Strong*, 14 Johns. 128; *Rodriguez v. Heffernan*, 5 Johns. Ch. 417, 429; *Kelly v. Smith*, 1 Blatchf. 290; *First National Bank v. Nelson*, 38 Ga. 391, 399; *Kinder v. Shaw*, 2 Mass. 397; *Newhold v. Wright*, 4 Rawle, 195; *Walther v. Wetmore*, 1 E. D. Smith, 7, 24; *Wright v. Solomon*, 19 Cal. 64; *Merchants' National Bank v. Trenholm*, 12 Heisk. 520; *McCreary v. Gaines*, 55 Tex. 485; S. C., 40 Am. Rep. 818; *Gray v. Agnew*, 95 Ill. 315. And in Louisiana this is held, notwithstanding the act of 1876: *Insurance Co. v. Kiger*, 103 U. S. 352. A usage of factors to pledge the goods of their principals is bad: *Newhold v. Wright*, 4 Rawle, 195.

It has been held, however, that while a factor can not pledge the goods for his own debt, he may pledge them for the payment of duties accruing on the specific goods; *Evans v. Potter*, 2 Gall. 12; or to the extent of his lien or interest: *Warner v. Martin*, 11 How. 209; *Blair v. Childs*, 10 Heisk. 199; *Louisville Bank v. Boyce*, 78 Ky. 42; S. C., 39 Am. Rep. 198; but this is denied: *Merchants' Nat. Bank v. Trenholm*, 12 Heisk. 520; and see *Bonito v. Mosquera*, 2 Bosw. 401, 413, 414. So if a merchandise broker, to whom goods are delivered by his principal, with power to sell, deliver, and receive payment, deposit them in the usual course of trade with a commission merchant, connected in business with a licensed auctioneer, who advances his notes thereon, the deposit binds the principal, who can not recover the value of the goods in trover: *Laussatt v. Lippincott*, 9 Am. Dec. 440; and see the observations on this case in the note thereto; and it is held that where a factor deposited the goods with other factors to sell, and the latter made advances thereon, and had no knowledge of any other claimants than the consignee, the subagent had a lien on the goods: *Bowie v. Napier*, 10 Id. 641. It is also held that a factor may pledge goods of his principal if he purchases them in his own name: *Leet v. Wadsworth*, 5 Cal. 404; and if goods are consigned to a factor to be sold, and the proceeds applied to the payment of notes executed to him by the consignor, on a wrongful pledge of them by the factor to a bank to secure a loan, the bank, having knowledge sufficient to put it on inquiry as to the consignor's rights, is bound to apply the proceeds to the payment of the notes: *St. Louis Bank v. Ross*, 9 Mo. App. 399. A factor, although he can not pledge, may deliver the goods to a third person as se

curity, with notice of his lien, and as his agent to keep the possession for him, in order to preserve the lien: *Urquhart v. McIver*, 4 Johns. 103; and see, to the same effect, *McCombie v. Davies*, 7 East, 5. The principal's receiving money arising from the sale of goods by a factor, who had previously pledged the goods without authority, will not be regarded as a confirmation of the sale and as an affirmance of the pledge, if the principal was ignorant of the source from which the money came at the time he received it: *Bott v. McCoy*, 56 Am. Dec. 223. A factor, when he pledges, is estopped by his act, and can not be allowed to allege his own violation of authority to set aside the transfer and recover the goods; and he can not subsequently sell the goods and enable the vendees to set aside the contract of pledge, where such contract has not been disaffirmed by the principal: *Id.* Intimately connected with a factor's power to pledge is his power to deliver the goods in payment of his own debt. In *Benny v. Rhodes*, 18 Mo. 147, it is held that a factor can not deliver his principal's goods to another in payment of the factor's own antecedent debt; the principal's title is not divested, and the circumstance that the factor has a lien on the goods makes no difference; and to the same effect is *Benny v. Pegram*, *Id.* 191.

2. *Under Factors' Acts.*—The hardship produced by the common-law rule with reference to pledges by factors gave rise to the passage in England of the so-called "factors' act," 4 Geo. IV., c. 83, which has subsequently been re-enacted in an amended form in 6 Geo. IV., c. 94, and 5 & 6 Vict., c. 39, by which factors and other agents may pledge their principal's goods under certain circumstances. By the statute of Victoria it is provided that "any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bona fide* made by any person with such agent, or intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all persons interested therein, notwithstanding the person claiming such pledge or lien may have notice that the person with whom such contract or agreement is made is only an agent." It will be impossible here to consider these statutes to any full extent. Their general scope will be found discussed by Lord St. Leonards in *Navulshaw v. Brownrigg*, 2 De G. M. & G. 441; by Page-Wood, V. C., in *Jewan v. Whitworth*, L. R., 2 Eq., 692; and by Lord Coleridge in *Cole v. North Western Bank*, *Id.*, 9 C. P., 470. Under the statute of Victoria *bona fide* and continuing advances are protected; but the statute does not cover pledges made by factors to protect antecedent debts: *Learoyd v. Robinson*, 12 Mee. & W. 745; *Jewan v. Whitworth*, L. R., 2 Eq., 692; *Macnes v. Gorst*, *Id.*, 4 Eq., 315; *Portalis v. Tetley*, *Id.*, 5 Eq., 140. An agent "intrusted with the possession of goods, or of the documents of title to goods," within the factors' acts, is one who is intrusted as agent for sale; and consequently one whose authority to sell has been revoked can not make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal: *Fuentis v. Montis*, *Id.*, 3 C. P., 268; *Id.*, 4 C. P., 93.

Factors' acts have been enacted also in several of the states. Under the New York factors' act, Laws 1830, c. 179; 3 N. Y. R. S., 7th Banks' ed., 2257, a factor has power to pledge in the ordinary course of business; and a

pledgee who has acted in good faith, without notice, and made a new advance or gave a new obligation on the credit of the goods, is protected to the extent of his *bona fide* advances or liabilities. See, as illustrating these propositions, *Jennings v. Merrill*, 20 Wend. 9; *Stevens v. Wilson*, 6 Hill, 512; S. C. on appeal, 3 Denio, 472; *Cartwright v. Wilmerding*, 24 N. Y. 521; *First National Bank v. Shaw*, 61 Id. 283; *Kinsey v. Leggett*, 71 Id. 387. The shipment must have been in the factor's name: *Covell v. Hill*, 6 Id. 374; *Wilson v. Nason*, 4 Bosw. 155; *Bonito v. Mosquera*, 2 Id. 401; *First National Bank v. Shaw*, 61 N. Y. 283; *Kinsey v. Leggett*, 71 Id. 387; and the possession of the factor contemplated by the act is the actual as distinguished from the constructive possession: *Howland v. Woodruff*, 60 Id. 73. As under the New York act, by the Pennsylvania factors' act of 1834, if the pledgee knew that the goods were owned by a principal, he will not be protected; and the principal may recover in replevin without repayment of the loan: *Macky v. Dillinger*, 73 Pa. St. 85. Compare in this connection the statute of Victoria quoted *supra*. In Missouri a factor may pledge his consignor's goods to the extent of advances and charges thereon, but no further: *Steiger v. Third National Bank*, 2 McCrary, 494; and in Louisiana he can not pledge for his own debt: *Insurance Company v. Kiger*, 103 U. S. 352. Under both the Wisconsin warehouse receipt act and the factors' act, if a principal empowers his factor to purchase and retain a negotiable warehouse receipt, or transfers to him possession of such receipt, the factor has power not only to sell but to pledge the receipt to one dealing with him in good faith, and notice that he holds the receipt as factor is not notice of any limit of his power, as between him and his principal, to sell or pledge it; though such sale or pledge will not bind the principal if the vendee or pledgee has notice that it is made in violation of the principal's instructions: *Price v. Wisconsin etc. Ins. Co.*, 43 Wis. 267. But in *Victor etc. Co. v. Heller*, 44 Id. 265, it was held that neither at the common law nor under the factors' act could a person intrusted with merchandise simply as agent for its sale dispose of it by barter to one who knows the goods bartered to be for the agent's own use, or pledge it for his own indebtedness for goods sold to him as for his own use. The California civil code, section 2991, provides that "one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it can not set up his own title to defeat a pledge of the property, made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value;" and under this it is held that the transfer of a warehouse receipt, by an agent for sale, to one in good faith, and in the ordinary course of business, operated as a transfer to the holder of the title to the goods covered by the receipt; and that a pre-existing debt was a sufficient consideration: *Davis v. Russell*, 52 Cal. 611. In this connection see section 2368, subdivision 2, of the same code, which seems to conflict with the section above given, but probably refers to the authority of factors as between themselves and their principals only. Of course these factors' acts are only designed to protect third persons dealing with factors, and do not affect the liability of factors to their principals for a wrongful pledge.

POWER OF FACTORS TO INSURE.—Factors having goods in their possession may insure them, but they are not bound to do so, unless they have received orders to insure, or the usage of trade or the habit of dealing between them and their principals raises an obligation to insure: Story on Agency, sec. 111; *Brishan v. Boyd*, 4 Paige, 17; *Schaeffer v. Kirk*, 49 Ill. 251; *Shoenfeld v. Fleisher*, 73 Id. 404; *Waters v. Monarch etc. Ins. Co.*, 5 El. & Bl. 870; and see Cal. Civ. Code, sec. 2368, subd. 1; and they may insure the goods in their

own names to the full value: *Brisban v. Boyd*, 4 Paige, 17; *Ælea Ins. Co. v. Jackson*, 18 B. Mon. 242; *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84. If a factor who is in any case required to insure his principal's goods fails to do so, he becomes the insurer himself, and liable as such in the event of loss, in which case he is entitled to credit for premiums which should have been paid: *Paley on Agency*, 18; *De Taslett v. Crousillat*, 2 Wash. 132; *Shoenfeld v. Fleisher*, 73 Ill. 404.

FACTOR'S LIEN.—A factor has a general lien on goods of his principal in his possession, their proceeds and securities taken for the price, for advances, expenses, and commissions, and extending to the general balance of his accounts, but not to debts outside the agency: *Paley on Agency*, 128, 147; 2 Kent's Com. 640; *Story on Agency*, sec. 376; *Whart. on Agency*, secs. 767, 768, 775; *Kruger v. Wilcox*, Amb. 252; *Godin v. London Assur. Co.*, 1 W. Black. 104; S. C., 1 Burr. 489; *Green v. Farmer*, 4 Id. 2214, 2218; *Hudson v. Granger*, 5 Barn. & Ald. 27; *Hodson v. Payson*, 5 Am. Dec. 439; *Patterson v. McGahey*, 13 Id. 298. and note: *McKenzie v. Nevins*, 38 Id. 291; *Lambeth v. Turnbull*, 39 Id. 536; *Knapp v. Alvord*, 40 Id. 241; *Martin v. Pope*, 41 Id. 66; *Bryce v. Brooks*, 26 Wend. 367; *Peisch v. Dickson*, 1 Mason, 9; *Sewell v. Nichols*, 34 Me. 582; *Myer v. Jacobs*, 1 Daly, 32; *United States v. Villalonga*, 23 Wall. 35; *Brown v. Combs*, 63 N. Y. 598. This lien extends to debts connected with the agency, which the factor has undertaken as surety or for the accommodation of the principal: *Drinkwater v. Goodwin*, Cowp. 251; *Hammond v. Barclay*, 2 East, 227; *Hidden v. Waldo*, 55 N. Y. 294; and to interest on subsequent advances: *Heins v. Peine*, 6 Robt. 420. But possession of the goods with the consent of the principal is required before the lien can attach: *Paley on Agency*, 137; *Whart. on Agency*, sec. 769; *Holland v. Humble*, 1 Stark. 143; *Bank of Rochester v. Jones*, 55 Am. Dec. 590; *Brown v. Wiggan*, 16 N. H. 312. An important question in this connection is, Can the lien of a factor, who has accepted bills or made advances on the faith of goods consigned to him, attach before the goods are in his actual possession? Certain English cases answer this in the negative: *Kinloch v. Craig*, 3 T. R. 119; *Nichols v. Clent*, 3 Price, 547; *Bruce v. Wait*, 3 Mee. & W. 15.

In *Davis v. Bradley*, 28 Vt. 118, Redfield, J., held that to give a factor a lien upon goods consigned to him but not actually received, the following incidents must occur: 1. The consignment must be in terms to the factor; 2. As against creditors and subsequent purchasers of the consignor it is requisite that the consignee should have made advances and acceptances upon the faith of the particular consignments. The shipper's receipt had been sent to the factor, but Judge Redfield approved of *Holbrook v. Wight*, 35 Am. Dec. 607, where there was no symbolic delivery by a bill of lading or carrier's receipt, but where it was held that consignees making acceptances on the faith of the goods had a lien thereon. The learned judge also approved of the case of *Bryans v. Nix*, 3 Mee. & W. 775, holding that the one at bar could not be distinguished from it. The latter case decides that there may be a symbolic delivery by a carrier's receipt or bill of lading, whereby the factor's lien will attach to goods shipped to him; but the goods for which the receipt was given must have been actually shipped. The early cases of *Kinloch v. Craig*, *Nichols v. Clent*, and *Bruce v. Wait*, cited above, were distinguished on the ground that in none of them was there any documentary or other evidence to prove that the intention of the consignor was to vest the property in the consignees from the moment of delivery to the carrier. This rule, that consignment alone to a factor, who has made advances or incurred liabilities on the credit of the goods consigned, is insufficient to enable his lien to attach;

but that delivery to him of a bill of lading or carrier's receipt, with the design of giving him control of the goods, is sufficient, would seem to be the true doctrine, and is either held or recognized in the following: *Haille v. Smith*, 1 Bos. & Pul. 563; *Vallé v. Cerré's Adm'r*, 36 Mo. 575; *Lewis v. Galena etc. R. R.*, 40 Ill. 281; *Strahorn v. Union etc. Co.*, 43 Id. 424; *Bonner v. Marsh*, 48 Am. Dec. 754; *Bank of Rochester v. Jones*, 55 Id. 290; see, however, *Winter v. Coit*, 7 N. Y. 288. In *Desha v. Pope*, 41 Am. Dec. 76, the lien was held to attach when the bill of lading was given to the carriers to be delivered to the factor; but see *Bonner v. Marsh*, 48 Id. 754. Placing goods upon drays of an agent of the factors, for the purpose of transportation to their warehouse, places the goods in the factors' possession sufficiently to support their lien from that time: *Burns v. Kyle*, 56 Ga. 24; and see *Bonner v. Marsh*, *supra*, as to delivery to agents being sufficient, in general. On the other hand, certain cases go to the extent of holding that delivery to a common carrier consigned to the factor is alone sufficient: *Wade v. Hamilton*, 30 Ga. 450; *Elliott v. Cox*, 48 Id. 39; *Hardeman v. De Vaughn*, 49 Id. 596; and see *Nelson v. Chicago etc. R. R.*, 2 Ill. App. 160; and others hold the opposite extreme, that the factor must have possession of the goods by himself or agent, and possession of the bill of lading is insufficient: *Woodruff v. Nashville etc. R. R.*, 2 Head, 87; *Saunders v. Bartlett*, 12 Heisk. 316; *Oliver v. Moore*, Id. 482. Both of these views are open to criticism. The factor's lien may be lost or waived by agreement of the parties or by implication: *Paley on Agency*, 147; *Whart. on Agency*, sec. 772; *Shiffer v. Feagin*, 51 Ala. 335; *Heard v. Russell*, 59 Ga. 25; but the legal inference where a factor makes advances is that they were made upon the joint credit of the principal's personal security and of the goods and money that might come to his hands; and the factor may relinquish either without affecting his right to look to the other: *Martin v. Pope*, 41 Am. Dec. 66. The lien of a factor is a personal privilege. "None but the factor himself can set up this privilege against the owner. It is a personal privilege, and can not be transferred, nor can the question arise between any but the principal and factor:" *Holly v. Huggefords*, 19 Id. 303, *per* Parker, C. J.; but see *Gage v. Allison*, 2 Id. 682, as to the right of a factor's executors to retain the goods for his lien. A factor may foreclose his lien by equitable action, and is entitled to a deficiency judgment: *Whitman v. Horton*, 14 Jones & S. 531. As to a factor's right to sell the goods to reimburse himself, see *Bailey v. Bensley*, 87 Ill. 556; *Fordyce v. Peper*, 16 Fed. Rep. 516.

SUITS BY FACTORS AND PRINCIPALS AGAINST THIRD PERSONS.—The rule is laid down by Mr. Wharton that "as a factor has a special ownership in goods consigned to him, he may sue in his own name for the price of such goods when sold by him:" *Whart. on Agency*, sec. 755; and see *Sadler v. Knight*, 4 Camp. 195; *Toland v. Murray*, 18 Johns. 24; *Murray v. Toland*, 3 Johns. Ch. 569; *Girard v. Taggart*, 5 Serg. & R. 19, 27; *Graham v. Duckwall*, 5 Bush, 12; *Isley v. Merriam*, 54 Am. Dec. 721; or for damages for breach of contract: *Groover v. Warfield*, 50 Ga. 644; and under the reformed procedure, a factor who contracts in his own name on behalf of his principal is a trustee of an express trust, and may sue in his own name for the price: *Grinnell v. Schmidt*, 2 Sandf. 706; *Ladd v. Arkell*, 5 Jones & S. 35. So a factor may sue in his own name for trespasses or torts committed on the goods while in his possession: *Whart. on Agency*, sec. 755; or he may maintain trover or replevin if they be wrongfully withheld from him. See *Ladd v. Arkell*, 5 Jones & S. 35; *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84, 110; *Holbrook v. Wright*, 35 Am. Dec. 607. But where suit is brought by the factor, the de-

fendant is entitled to any defense which could have been made against the principal had the suit been brought by the latter: Whart. on Agency, sec. 755.

The principal may also sue the vendee in his own name for the price of goods sold by the factor, or for damages for non-performance of the contract: Whart. on Agency, sec. 762; *Ilaley v. Merriam*, 54 Am. Dec. 721; *Girard v. Taggart*, 5 Serg. & R. 19, 27; and this, although the principal was unknown at the time of the sale, and the vendee supposed the factor to be the real owner: Whart. on Agency, sec. 762; *Ilaley v. Merriam*, 54 Am. Dec. 721; *Walter v. Ross*, 2 Wash. 283; *Kelley v. Munson*, 7 Mass. 319; *Leverick v. Meigs*, 1 Cow. 645; *Merrick's Estate*, 5 Watts & S. 9. In suits by the principal, as in other cases, the factor's private debt can not be set off against the vendee's debt on the sale: Whart. on Agency, sec. 741; *Catterall v. Hindle*, L. R., 1 C. P., 186; *Dresser v. Norwood*, 17 C. B., N. S., 466; *Guy v. Oakley*, 13 Johns. 331; *Miller v. Lea*, 35 Md. 396; but the rule is otherwise if the factor is held out as principal: Whart. on Agency, secs. 741, 762; *George v. Clayett*, 7 T. R. 359; *Rabone v. Williams*, Id. 360, note; *Carr v. Hinchliff*, 4 Barn. & Cress. 547; *Turner v. Thomas*, L. R., 6 C. P., 610; *Hogan v. Shorb*, 24 Wend. 458; *Merrick's Estate*, 5 Watts & S. 9; *Miller v. Lea*, 35 Md. 396. Payment may be made to the principal against the orders of the factor: *Golden v. Levy*, 6 Am. Dec. 555; and in general it has been held payment must not be made to the factor after notice from the principal: *Kelly v. Munson*, 5 Id. 47.

FACTOR'S LIABILITY TO THIRD PERSONS.—As in the case of other agents, factors may undoubtedly become personally responsible when they deal with third persons without disclosing their agency: Story on Agency, sec. 266; Whart. on Agency, sec. 788; although the principal, when afterwards discovered, may also be held: Id. In *Hastings v. Lovering*, 13 Am. Dec. 420, it is held that a factor who sells oil with a warranty of quality, without designating himself as agent, is personally liable on the warranty, although he had settled with the principal before notice of the breach, and although the vendee was informed before action brought that the factor was not acting for himself.

PRINCIPAL'S RIGHT TO FOLLOW GOODS OR THEIR PROCEEDS.—The general doctrine is, that where a principal can trace his goods into the hands of a factor, he may follow the identical articles or their proceeds, or securities taken therefor, as long as they can be distinguished, into the possession of the factor, or of his legal representatives or assignees; 2 Kent's Com. 623; Whart. on Agency, sec. 763; *Price v. Ralston*, 1 Am. Dec. 260; *Chesterfield Mfg. Co. v. Dehon*, 16 Id. 367; *Taylor v. Plumer*, 3 Man. & Sel. 562; *Veil v. Petray*, 4 Wash. 105; *Thompson v. Perkins*, 3 Mason, 232; *Sheffer v. Montgomery*, 65 Pa. St. 329; *Farmers' etc. Bank v. King*, 57 Id. 202. This has been frequently so held in England in the case of a factor's becoming bankrupt, the statute of 21 Jac. I., c. 19, secs. 10, 11, and the subsequent amendatory statutes of 6 Geo. IV., c. 16, sec. 72, and 12 & 13 Vict., c. 106, sec. 125, being held not to apply; *Tooke v. Hollinsworth*, 5 T. R. 215, 226; *L'Apostre v. Le Plaistrier*, cited 1 P. Wms. 318; *Godfrey v. Furzo*, 3 Id. 185; *Ryall v. Rolle*, 1 Atk. 165, 174; *Scott v. Surman*, Willes, 400; *Bryson v. Wylie*, 1 Bos. & Pul. 83, note, per Buller, J.; *Horn v. Baker*, 9 East, 215, 244; *Hamilton v. Bell*, 10 Ex. 545; *Whitfield v. Brand*, 16 Mee. & W. 282; and see *Price v. Ralston*, 1 Am. Dec. 260; *Messiero v. Amery*, 1 Yeates, 533, 540; *Thompson v. Perkins*, 3 Mason, 232. But if the goods are in the bankrupt's possession under such circumstances as to make him appear the true owner, the principal may lose the goods: *Hamilton v. Bell*, 10 Ex. 545; *Livesay v. Hood*, 2 Camp. 83; *Shaw v. Harvey*, 1 Ad. & El. 920. So if the proceeds have been disposed of by the

legal representatives or assignees in their representative character, before notice of the principal's claim: 2 Kent's Com. 623; Whart. on Agency, sec. 763; *Veil v. Petray*, 4 Wash. 105; *Taylor v. Plumer*, 3 Mau. & Sel. 562. Where a factor deposited in a bank to an account by itself all drafts received by him for sales, the fact that his deposits included his commissions is not such a mixing of funds as will prevent the principal from following them: *Richardson v. St. Louis Nat. Bank*, 10 Mo. App. 246. Persons whose goods are sold by their factors were held in *Ward v. Brandt*, 13 Am. Dec. 352, to have no lien on the debt arising from the sale, in case the proceeds could not be identified in the principal's hands. If a factor, under an entire contract for a gross sum, sells goods, some of which belong to himself and some to his principal, the latter can not maintain an action against the purchaser for the value of the goods: *Roosevelt v. Doherty*, 129 Mass. 301; S. C., 37 Am. Rep. 356.

PRINCIPAL, WHETHER CAN SUE FACTOR WITHOUT DEMAND.—It is laid down that a factor to whom goods have been sent to be sold on commission can not be sued until after demand made or instruction to remit: Whart. on Agency, sec. 787; *Topham v. Braddick*, 1 Taunt. 572; *Burns v. Pillsbury*, 17 N. H. 66; *Ferris v. Paris*, 10 Johns. 285; *Cooley v. Betts*, 24 Wend. 203; *Halden v. Crafts*, 4 E. D. Smith, 490; *Brink v. Dolsen*, 8 Barb. 337; see, however, *Clark v. Moody*, 17 Mass. 145; *Dodge v. Perkins*, 9 Pick. 368. So a factor having moneys in his hands arising from a sale is liable for interest thereon only after demand made by the principal, if he has promptly rendered account sales, unless a special usage of trade is shown, or a failure to remit according to instructions: *Tyree v. Parham's Ex'r*, 66 Ala. 424. And to render a factor liable for conversion, demand must be made while the property or its proceeds is in his hands, or it must be shown that he had notice of the true owner's rights or of the want of title of the party placing the goods in his hands: *Roach v. Turk*, 9 Heisk. 706; S. C., 24 Am. Rep. 360.

FACTORS OF FOREIGN PRINCIPALS.—The general rule is stated to be that factors acting for persons residing in foreign countries are personally liable upon all contracts made by them, whether their principals were disclosed or not: Paley on Agency, 248; Story on Agency, sec. 268; *New Castle Mfg. Co. v. Red River R. R.*, 36 Am. Dec. 686; *McKenzie v. Nevins*, 38 Id. 391; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Rogers v. March*, 33 Me. 106, 112. "But," says Mr. Wharton, "it must be remembered that this conclusion rests upon usage and the intent of parties, not upon any inexorable rule of law. The presumption is that the factor, known to be such, and trusted as such, is accepted as the exclusive debtor; but this presumption dies away if it be shown that the creditor intended to hold liable the foreign principal:" Whart. on Agency, sec. 791; and see Story on Agency, sec. 268. Where also the factor is thus exclusively looked to, he is not only the person to be sued, but the person to sue: Whart. on Agency, secs. 791, 793; *Merrick's Estate*, 5 Watts & S. 9; but in this connection it may be well to quote from Bigelow, J., in *Barry v. Page*, 10 Gray, 398. He says: "It has been sometimes said that when a sale is made by a factor for a foreign principal, the latter can not sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is that exclusive credit was given to the agent, and therefore the principal can not be treated in any manner whatever as a party to the contract. But the later and better opinion is that there is no such absolute presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by the factor, unless it

is made affirmatively to appear that exclusive credit was given to the agent by proof other than the mere fact that the principal resided in another state or country:" and see *Taintor v. Prendergast*, 3 Hill (N. Y.), 72; *Ilsey v. Merriam*, 54 Am. Dec. 721.

DEL CREDERE FACTORS.—In the language of Lord Ellenborough, "a commission *del credere* is the premium or price given by the principal to the factor for a guaranty:" *Morris v. Cleasby*, 4 Mau. & Sel. 566, 574. A *del credere* factor, therefore, when he sells on credit, warrants the solvency of the purchaser: Smith's Mer. Law, 163; Whart. on Agency, sec. 784; *Macbenzie v. Scott*, 2 Bro. P. C. 280. A *del credere* factor's contract is that of a guaranty of his vendees, but not of the worth of bills purchased by him and remitted in payment: *Sharp v. Emmett*, 34 Am. Dec. 554. It was at one time thought in England that a *del credere* factor was liable as principal: *Grove v. Dubois*, 1 T. R. 112; *Bize v. Dickason*, Id. 285; but later decisions treat his liability as that of a surety: *Morris v. Cleasby*, 4 Mau. & Sel. 566, 574; *Hornby v. Lacy*, 6 Id. 166, 171; *Couturier v. Hastie*, 8 Ex. 40, 56. The American cases, however, follow the early English decisions, and consider him as absolutely liable to pay the price when the credit has expired: *Wolff v. Koppel*, 43 Am. Dec. 751; *Swan v. Nesmith*, 19 Id. 282; *Leverick v. Meigs*, 1 Cow. 645, 664; *Blakely v. Jacobson*, 9 Bosw. 140, 147; *Sherwood v. Stone*, 14 N. Y. 267; *Cartwright v. Greene*, 47 Barb. 9; *Lewis v. Brehane*, 33 Md. 412, 425; *contra*: *Thompson v. Perkins*, 3 Mason, 232, 235; *Wolff v. Koppel*, 5 Hill (N. Y.), 458. In reference to the duties of such an agent, the following language is used by Mellish, L. J., in *Ex parte White*, L. R., 6 Ch., 397, 403: "I apprehend that a *del credere* agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them;" and in *Catterall v. Hindle*, Id., 1 C. P., 186, 191, it was argued, where a factor undertook to receive a payment out of the usual course of business, that since he was acting under a *del credere* commission, he was not bound to the strict rule of factorship; but Keating, J., said: "We think this makes no material difference as to the question raised in this case. The agent selling upon a *del credere* commission receives an additional consideration for extra risk incurred, but is not thereby relieved from any of the obligations of an ordinary agent, as to receiving payment on account of his principal." *Del credere* guaranties are held not to be within the statute of frauds, as being promises to answer for the debt, default, or miscarriage of another; they are original agreements of suretyship: *Wolff v. Koppel*, 5 Hill, 458; 8. C. on appeal, 43 Am. Dec. 751; *Swan v. Nesmith*, 19 Id. 282; *Sherwood v. Stone*, 14 N. Y. 267; *Couturier v. Hastie*, 8 Ex. 40.

AMIDOWN v. OSGOOD.

[24 VERMONT, 278.]

QUESTION WILL NOT BE CONSIDERED ON APPEAL when not raised in the court below.

NOTICE OF DISSOLUTION OF PARTNERSHIP MUST BE ACTUAL as to those who have had previous dealings with the firm, and notice by publication is required as to others, in order to exonerate a retiring partner.

CREDIT MUST BE REGARDED AS GIVEN TO PARTNERSHIP where goods were delivered before any publication of its dissolution and the retiring partner remained in the store as clerk, but with the old sign up.

ACTUAL NOTICE OF DISSOLUTION OF PARTNERSHIP IS REQUIRED in order to exonerate a retiring partner as to those who have dealt upon the credit of the firm after its dissolution, but before notice thereof had been published.

BOOK-ACCOUNT. The partnership which had existed between the defendants, Osgood and Minard, had been dissolved prior to any dealings with the plaintiffs, but after the dissolution the business was carried on in the same store by Minard, with the firm sign unaltered, until he failed. The first bill of goods, marked "A," had been purchased by Minard through the solicitations of an agent of the plaintiffs, who had noticed the old sign, before any publication of dissolution, and while Osgood still remained in the store as clerk. Nothing was then said about the dissolution of the partnership, and the bill was made out to Osgood & Minard, and sent with the goods to Minard's store, in the firm name. Minard did not know in whose name the bill was made out until he received it, and then he did not inform the plaintiffs that it was incorrect. One of the plaintiffs' firm visited Minard's store between the times of the first and second purchases, but nothing was said about the dissolution of the firm, nor of the plaintiffs' error in charging the goods; nor was anything said of the dissolution when Minard purchased the second bill. Minard afterwards made a third purchase in his own name, and consigned in his own name a quantity of mittens to the plaintiffs, more than sufficient to pay this bill. Soon after the first purchase, notice of the dissolution of the firm had been published in the place of business. The auditor found a certain amount due on the first two bills, and judgment was rendered on his report in favor of the plaintiffs. Exceptions by the defendants.

A. Keyes, for the plaintiffs.

Stoughton and Baxter, for the defendants.

By COURT. There does not seem to be any good reason to require the plaintiffs to set off the value of the mittens consigned to them by Minard against the goods sold on the credit of Osgood & Minard, if the plaintiffs were justified in so selling the goods. For, first, no such question appears ever to have been raised in the case before this time, and by every rule of

practice it must have been raised in the court below in order to form any ground of error in this court. Secondly, if the two first bills of goods were fairly delivered on the credit of Osgood & Minard, then there can be no doubt the offset must first be applied to extinguish Minard's own debt, which may have been contracted upon the faith of this very consignment. The only question, then, is, whether defendants are liable for the goods charged to them.

The law requires that upon the dissolution of a mercantile partnership notice of such dissolution shall be published in a newspaper circulating in the place of such business, in order to exonerate the retiring partner even as to those with whom the firm have had no previous dealings, and as to these latter actual notice is required.

In the present case there can be no doubt the goods were really delivered upon the credit of the partnership, which is the ground of decision in the case cited: *Pott v. Eyton*, 54 Eng. Com. L. 31. And as to the bill marked "A," the goods were delivered before any publication of dissolution and while Osgood still remained in the store, as clerk to be sure, but with the old sign still up. Under these circumstances, it seems to us the credit must be regarded as fairly given to the partnership. And in regard to future dealings, we do not see why in justice the plaintiffs should not be reasonably entitled to the same notice as if the dealing had been before the actual dissolution. Osgood knew that the firm would be liable for all goods bought by Minard on the credit of the firm before the publication of the dissolution, and as he trusted him with that power, it is but reasonable he should be bound to take notice how he used the power, and be bound by his use of it, the same as if he had actual notice, and so in reality to be bound by his abuse of the power.

This would impose upon him the necessity of searching out those with whom Minard had dealt upon the credit of the firm, before the publication of notice of the dissolution of the co-partnership, and give them actual notice of such dissolution. There seems to be some equity in requiring this in the present case, as if Osgood had had actual notice of the purchase of the first bill of goods upon the partnership credit.

The dissolution did not become effectual as to third persons until the publication. As to everybody but the parties, the date of the dissolution is the time of the publication, as the date of the record of a deed is the date of the deed to all purposes of third

persons who have acquired interest in the land subsequent to the date of the deed.

Judgment affirmed.

QUESTION NOT CONSIDERED ON APPEAL WHEN NOT RAISED IN COURT BELOW: *Nesbitt v. Dallam*, 28 Am. Dec. 236, and prior cases in note; *Driggs v. Dwight*, 31 Id. 283; *Jones v. Hardesty*, 32 Id. 180; *Schlencker v. Risley*, 38 Id. 100; *Reynolds v. Rowley*, Id. 233; *Clark v. State*, 40 Id. 481.

ACTUAL NOTICE OF DISSOLUTION OF PARTNERSHIP REQUIRED AS TO CUSTOMERS, in order to exonerate a retiring partner: *Prentiss v. Sinclair*, 26 Am. Dec. 288, and note, where the question is discussed; *Nott v. Downing*, Id. 491; *Watkinson v. Bank of Pennsylvania*, 34 Id. 521. The principal case is referred to on this point in *Rose v. Coffield*, 53 Md. 26.

PUBLICATION OF NOTICE OF DISSOLUTION OF PARTNERSHIP SUFFICIENT AS TO STRANGERS: Note to *Prentiss v. Sinclair*, 26 Am. Dec. 290; *Nott v. Downing*, Id. 491; *Watkinson v. Bank of Pennsylvania*, 34 Id. 521; *Galliot v. Planters' &c. Bank*, 36 Id. 256.

RETIRING PARTNER SUFFERING HIS NAME TO APPEAR AS ONE OF FIRM must at least be held liable to those who are misled by it: *Wait v. Brewster*, 31 Vt. 527, citing the principal case.

CURTIS v. LYMAN.

[24 VERMONT, 338.]

INDEX CONSTITUTES NO PART OF RECORD under the Vermont statutes, and a mortgage, to the record of which no index or alphabet was made by the town clerk, becomes an incumbrance upon the land from the time it is transcribed upon the record, postponing a subsequent deed.

BILL in chancery to foreclose a mortgage. The facts are stated in the opinion.

By Court, HALL, J. This is an appeal from chancery. The bill is for the foreclosure of a mortgage in common form. The complainants are the mortgagees; one of the defendants, Edgerton, being the mortgagor, and another defendant, Lyman, being a purchaser under Edgerton.

The facts found, and about which there is little or no controversy, are these: Edgerton being indebted to the plaintiffs by note in the sum of two thousand dollars, mortgaged to them certain lands, which mortgage was transcribed upon the book of records of the town on the eleventh of June, 1835, and duly certified as recorded; but no reference to the record was entered upon the alphabet. Subsequently, the defendant Lyman, without actual notice of the mortgage, and before the record of it was alphabeted, for the consideration of five thousand dollars,

purchased the same land of the mortgagor, his deed being recorded February 7, 1839. Both the mortgage and deed were received for record and certified as recorded by Edgerton, the mortgagor, who from March, 1835, to March, 1841, was the town clerk; and the reference to the mortgage was first entered on the index by the subsequent town clerk in August or September, 1844. There is no evidence that the mortgagees had any knowledge of the neglect of the town clerk to enter their mortgage on the alphabet, and they must be taken to be ignorant of it. No other objection is made to the record but the want of an index to it, and it is to be treated as having been in all other respects regular and sufficient.

The question is whether the neglect of the clerk to index the mortgage shall render the record of it invalid, so as to postpone the title of the mortgagees to that of the subsequent purchaser.

The determination of this question must depend upon the construction of the statutes of 1797 in relation to the recording of conveyances, which statutes were in force when both deeds were lodged in the town clerk's office.

The fifth section of the act for regulating conveyances of real estate specifies the several requisites of such conveyances. It declares "that all deeds or other conveyances of any lands, tenements, or hereditaments, lying in this state, signed and sealed by the party granting the same, having good and lawful authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors before a justice of the peace, and recorded at length in the clerk's office of the town in which such lands, tenements, or hereditaments lie, shall be valid to pass the same without any other act or ceremony in law whatever."

If the language of this statute were to be taken in its ordinary sense and serve to control our decision, there would seem to be but little doubt of its effect. There would in regard to the mortgage appear to have been a full and literal compliance with the words of the statute. The mortgage had been transcribed at length in the town clerk's office, and by the proper officer, and duly certified as recorded; and that is what is commonly understood as constituting a record of it.

It is however said, that although the ordinary signification of the word "recorded" may be satisfied by what was done in this case, yet, that the act regulating town meetings, and the choice and duty of town officers, is to be construed as providing an additional requisite to the record of conveyance—in other words,

as in effect declaring that a deed shall not be considered as recorded until an index to it is entered upon the alphabet.

No such language is, however, found in that act, nor do we think any intention to ingraft such additional requisite upon a deed can be fairly implied from the language used. The object of the act is to point out the duty of the clerk, not only in the making of a proper record of conveyances, but also in furnishing facilities for their discovery, examination, and use by all persons interested in them. And to secure the due performance of these duties, the clerk is made liable to the party injured for the neglect of them, and to the security of the party injured is superadded, by a subsequent statute, the responsibility of the town. The index or alphabet, which it is the duty of the clerk to have annexed to his book, seems to be one of the facilities to be used in making search for the record, not a part of the record itself. It is his duty to have an index, and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so he and the town are liable for the damages any person may suffer by it. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be void. The clerk may know the place of the record and may point it out to all who may wish to examine it. A purchaser may take his deed, relying alone upon the representations or covenants of his grantor without desiring to examine the records. An index, or the want of it, would seem to be of no importance to him. So if without making any search, or causing any to be made, a purchaser should rely solely on the representations of the clerk that the title was clear, and those representations should be knowingly false, it is perhaps questionable whether he could be said to be injured by the want of an index. That would only seem to become important when an actual search of the records was desired to be made. The legitimate ground of complaint in such case would probably be the fraudulent representations of the clerk.

There are many practical difficulties in the way of making an index to the record an essential requisite to the validity of the title. The statute provides for an "index or alphabet." Are the two words used synonymously? Or have they here, as they often have, different meanings? Is it indispensable that the index should be in alphabetical order? If so, shall the name of the grantor or the grantee be alphabetized? Or shall there be two indexes, one of each? Must the Christian name be written at length? or will the initials be sufficient? It is obvious that if

an index is held to be an essential part of the record, the way will at once be opened for a serious and embarrassing course of litigation in settling by judicial construction what shall constitute a sufficient index, and what departures from a prescribed form shall render the record invalid. And all this perhaps when there has been no real injury to any one in consequence of a defective index.

But if from the want of an index, or a proper entry upon it, the record is to be inoperative, shall it be held absolutely void? If the reference to it upon the index be not made the instant the record is completed, is the record a mere nullity? Or may the record be restored and made operative by a subsequent entry upon the index? If so, when does the record take effect? If from the entry on the index, how is the true time to be shown? Shall the clerk certify upon the record the time of the entry? That has never been done. The true time the record takes effect must then in all cases be left open to be proved by parol. In this case it appears by the evidence of the town clerk that the plaintiff's mortgage was first alphabetized some time in August or September, 1844.

This evidence is quite too loose and uncertain from which to determine when a record is to become operative, as all parol evidence necessarily must be. It is obvious that if an entry of a deed upon the index is held to be essential to the validity of the record, that it must necessarily lead to inextricable confusion and uncertainty in regard to the priority of conveyances. Indeed, the difficulties in the way of a decision to that effect appear to us to be insurmountable. On the other hand, we do not perceive but that the object of the statute's providing for the recording of deeds will be fully answered by leaving anybody actually sustaining an injury from the want of an index, or by a defective one, to his statute remedy against the clerk and the towns.

The case of *Sawyer v. Adams*, 8 Vt. 172 [30 Am. Dec. 459], has been relied upon by the defendants' counsel as having an important bearing upon the question in this. But our decision does not conflict with the law of that case. The facts in that case were peculiar. From them the court found that there had been in effect no record of the deed upon the book of records. Chief Justice Williams, in delivering the opinion of the majority of the court, puts the case upon that ground. He says "that recording means the copying the instrument to be recorded in the public records of the town, in a book kept for that purpose,

by or under the superintendence of the officer appointed therefor." This the court held had not in that case been done. But it had clearly been done in this case. The deed was copied by the town clerk into the proper book, in the proper place, and duly certified as recorded, which would doubtless have been held by the court at that time to have been sufficient.

We are all agreed that the proper office of the index is, what its name imports, to point to the record, but that it constitutes no part of the record; and we must consequently hold that the plaintiff's mortgage became an incumbrance upon the land from the time it was transcribed upon the record, and that the defendant Lyman took his title subject to it.

The result is, that the decree of the court of chancery is to be affirmed, with directions to that court to fix upon a time for redemption and to carry this decree into effect.

INDEX IS NO PART OF RECORD IN VERMONT, but is only intended to furnish facilities for tracing titles; and an instrument is properly recorded when it is correctly transcribed at length in the clerk's office, without any other act or ceremony. In *Shrove v. Larsen*, 22 Wis. 146, this was said to be the Vermont rule as laid down by *Hunter v. Windsor*, 24 Vt. 327, and the principal case. But the court said: "This is doubtless a correct exposition of the statutes of that state; but those decisions seem to be inapplicable to our own, which is dissimilar in its provisions." And see also *Sawyer v. Adams*, 30 Am. Dec. 459. Marginal notes appended to the record of a deed can not affect its validity, nor are they proof of the facts set forth therein: *Doe v. Ex'rs of Dugas*, 31 Id. 432. As to the effect of a mistake in docketing a judgment where the statute requires an alphabetical docket, see *Buchan v. Sumner*, 47 Id. 305.

IRREGULARITIES IN RECORDING: See *Sawyer v. Adams*, 30 Am. Dec. 459, and note discussing the question; see also *McLanahan v. Reeside*, 36 Id. 136.

RECORD OF INSTRUMENT AS TAKING EFFECT FROM TIME OF DELIVERY TO RECORDING OFFICER: See *Linsley v. Garth*, 44 Am. Dec. 393, and prior cases in note.

WARNER v. CONANT.

[24 VERMONT, 351.]

JUDGMENT AT LAW NOT RELIEVED AGAINST IN CHANCERY ON GROUND OF NEGLIGENCE to attend the court, through forgetfulness of the action, or the day and time of holding court.

JUDGMENT AGAINST TRUSTEE IN TRUSTEE PROCESS IS AS CONCLUSIVE AGAINST HIM as a judgment in a common-law action; and the principles which forbid a court of chancery to relieve in one case must equally forbid such relief in the other.

BILL in chancery, praying for a decree that the defendant refund the amount collected by him of the orator Warner on an

execution issued on a judgment against the latter, as trustee of one Rice. The bill set forth that through forgetfulness the orator, on the return day of the process, failed to attend and make his disclosure, and judgment by default was taken against him as trustee; that execution had issued on the judgment, and the amount had been collected of the orator; and that the orator was not the trustee of Rice. An answer and a replication were filed, the cause was heard, and the bill dismissed. Further facts are stated in the opinion.

H. E. Stoughton, for the orator.

L. Adams, for the defendant.

By Court, ISHAM, J. The general object of this bill is to obtain a decree for the repayment of money collected by the defendant of the orator, on an execution issued on judgment against him as trustee of one Rice.

From the evidence which has been read in the case, we think it more than probable that if there had been a hearing on a disclosure, the person summoned as trustee would have been entitled to a discharge as not having effects in his hands; yet the conviction would be more full and perfect if a disclosure had been made. The last settlement between Warner and Rice was made February 14, 1848, but it was then understood not to be a settlement of all matters between them. Rice having soon after left the country, Warner carried onto his books a full statement of the account and credit, leaving a small balance due to Rice. How much that might have been increased, if at all, had Rice remained and settled the account, is of course a matter of conjecture.

The orator seeks relief on the ground that the judgment against him as trustee was obtained by "fraud, accident, or mistake."

In the case of *Denison v. True*, 22 Vt. 42, it was held by this court that a trustee could not maintain a petition under the statute, to the county court, to have a judgment against him vacated on the ground that it was obtained by "fraud, accident, or mistake," as he could not be considered a party to the suit; and for this reason the orator now seeks relief under the general powers of a court of chancery. From the testimony in the case, it is very evident that the defendant is entirely free from any imputation of fraud or impropriety of conduct in obtaining the judgment complained of. He commenced his suit in due

form, and in the observance of all legal requirements on his part, prosecuted the same to judgment, execution, and satisfaction.

The orator has, however, been deprived of a hearing in the case, which doubtless he intended and desired to have. But it is equally evident that this difficulty has arisen from his own neglect, or the pure forgetfulness of his agent, to whom this business was intrusted.

We do not feel at liberty to interfere in this case with the proceedings at law, upon the suggestion that the orator had not personal notice of the suit before judgment. He has not himself denied it under oath by swearing to his bill, and his agent Nicholson says he might have mentioned the fact to him, but thinks not. The process, however, was returned with a legal return thereon that personal service was made. This justified the defendant in proceeding to his judgment, and as between the parties, we must regard that fact as found in equity as well as at law. The case then presents the single inquiry, Will a court of chancery vacate a judgment at law, or order the money collected thereon to be refunded, on the ground that the party or his agent neglected to attend the court, and suffered judgment to pass by default, through their forgetfulness of the suit, or the day and time of holding the court? and whether such a circumstance is an accident or mistake from which a court of equity will relieve. The cases on this subject which have been decided in this state must be considered as conclusive in this.

In *Essex v. Berry*, 2 Vt. 161, where a judgment was obtained by default, in consequence of a letter sent by mail to their attorney not having been received in season, it was held that that circumstance was not such an accident as would warrant a court of equity to interfere, as common prudence would have guarded against that event by sending an agent. Equally so in this case. If the orator or his clerk had seasonably employed an agent or attorney, as he testifies he designed to do, there would have been the exercise of better and greater prudence; and in that case the court adopt the language of Lord Redesdale in *Bateman v. Willoe*, 1 Sch. & Lef. 201, that "a bill for a new trial is watched with extreme jealousy;" and also the language of Grose, J., in *Marriott v. Hampton*, 7 T. R. 269, that "it would tend to encourage the greatest negligence if the door were to be opened to parties to try their causes again, because they were not properly prepared at first;" so in the case of *Fletcher v. Warren*, 18 Vt. 45, the court say that a judgment at law may

have worked injustice between the parties, is not of itself enough to authorize a court of equity to relieve against it. It is necessary that a party not only should have had a good defense, but it must appear that he has been unable to avail himself of it through the fraud or wrongful act of his opponent; mere accident or mistake on his own part is to be accounted as his misfortune, not as imputing a wrong to the other party. Justice Story, under the head of "accident," speaking of the powers of a court of chancery, says: "That a party coming into a court of equity is bound to show that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents:" Eq. Jur. 119, sec. 105. The orator seeks to avoid the force of these decisions in courts of equity, by distinguishing between a judgment in a common-law suit and a judgment rendered in a trustee process against the trustee, not regarding the latter as a regular judgment. It is true that the principal debtor has rights under our statutes which can not be enjoyed by the trustee. But the judgment against the trustee is as much a matter of record, and the adjudication is as conclusive against him, as any judgment rendered at law, and the final process of execution issues on the judgment as in other cases. We entertain no doubt that the principles which forbid a court of chancery to relieve in one case must equally forbid such relief in the other.

The result is, that the decree of the chancellor is affirmed.

JUDGMENT OBTAINED THROUGH DEFENDANT'S NEGLIGENCE NOT RELIEVED AGAINST IN EQUITY: *Skinner v. Deming*, 54 Am. Dec. 463, and note collecting prior cases; *Casey v. Gregory*, 56 Id. 581.

CONNECTICUT AND PASSUMPSIC RIVERS RAILROAD CO. v. BAILEY.

[24 VERMONT, 465.]

MOTION TO DISMISS SUIT MUST BE FOR DEFECTS APPEARING ON RECORD, and can not be made upon proof *aliunde*.

SUBSCRIBER IS PERSONALLY LIABLE FOR ASSESSMENTS ON STOCK OF CORPORATION, where he signs a promise to pay therefor in the subscription book, although the only remedy given by the act of incorporation for a failure to pay assessments is a forfeiture of stock.

CERTIFICATE OF BOARD OF COMMISSIONERS IS CONCLUSIVE upon the validity of subscriptions to the stock of a corporation, the amount thereof, and on the question of legal organization, when the commissioners are appointed under an act of the legislature to find and certify on these facts.

FORFEITURE OF CHARTER OF CORPORATION CAN NOT BE SET UP BY STOCK-HOLDER as a defense to an action against him for assessments on his stock. The forfeiture can be taken advantage of only by the state, and in direct proceedings against the corporation.

EACH SUBSCRIPTION TO STOCK OF CORPORATION IS INDEPENDENT CONTRACT, and in no way connected with or dependent upon the terms or agreements concerning other subscriptions.

EVIDENCE OF PRIVATE PAROL AGREEMENTS WITH PREVIOUS SUBSCRIBERS TO CORPORATE STOCK, made at or before signing, and inconsistent with the written terms of subscription, is inadmissible in an action for assessments against a subscriber.

MUTUALITY OF OBLIGATION EXISTS IN TERMS OF SUBSCRIPTION TO CORPORATE STOCK, although the subscription was subject to the acceptance or rejection of commissioners until the organization of the corporation; it not appearing that the subscription was rejected by the commissioners or disaffirmed by the corporation when it became organized.

SUBSCRIBER CAN NOT OBJECT TO ALTERATIONS IN CORPORATE CHARTER SUBSEQUENT TO HIS SUBSCRIPTION to the stock, where his assent and requirement thereto is to be inferred, and the alterations were necessary, and permitted the application of the money to the purpose for which it was specifically subscribed.

ASSUMPSIT to recover the amount of several assessments on two shares of capital stock subscribed for by the defendant. The subscription signed by the defendant, and introduced by the plaintiffs in evidence on the trial, after reciting the existence of the charter and the names of the commissioners appointed by the legislature to open the books and receive subscriptions to the capital stock, was as follows: "Now we the subscribers hereby associate in said enterprise, and do hereby agree with said corporation to take the number of shares respectively placed against our names, on the following terms and conditions: No subscriber shall be held by his subscription to pay assessments amounting in all to more than one hundred dollars on each share, or so much thereof as shall be assessed, the subscribers are held to pay, and said company may enforce their claim thereto, with expenses of collection, by sale of the shares, and by suit, or by either of said means. All subscriptions hereto shall, until said company shall be organized, be subject to the acceptance or rejection of the majority of said commissioners. The condition of the following subscriptions is, that all assessments shall be for the construction, and preliminaries for the construction, of that portion of the road lying between Derby line and the mouth of White river." The evidence of the plaintiffs tended to show that the company had been organized as required by the acts of incorporation, and that a certificate of the organization and the subscription books had been delivered to

the officers of the corporation. A certificate of the secretary of state was also given in evidence by the plaintiffs, showing that the commissioners had certified to the due organization of the corporation. No evidence was offered by the defendant, but on cross-examination it appeared that the witness of the plaintiffs who had testified that the requisite amount of capital stock had been subscribed did not personally know that all the signatures to the subscription list were genuine; that one of the agents employed by the plaintiffs to solicit subscriptions verbally agreed with some of the subscribers that if they requested him to take their shares after paying one assessment thereon he would do so; that in some cases he had so taken stock of persons whose names were prior to that of the defendant on the subscription list; that some of the shares, after being taken, had been surrendered to the officers of the corporation and bonds delivered thereon; and that such agreement and exchange were made with a person who subscribed for stock when the defendant did. No testimony was given to show that twenty thousand dollars, or any sum, had been expended in the construction, or preliminaries for construction, of the plaintiffs' road, as required by the act of incorporation. The plaintiffs had a verdict, and thereafter, and before judgment, a motion in arrest of judgment was filed by the defendant, but was overruled. In this case the name of the clerk was written on slips of paper and attached to the writ and recognizance. There was a motion to dismiss the action at a former term, which was overruled. Other facts and the questions arising in the case appear in the opinion.

L. Underwood and J. W. D. Parker, for the plaintiffs.

R. McK. Ormsby, for the defendant.

By Court, ISHAM, J. Several questions are presented in this case, arising, first, on the motion to dismiss, and secondly, on exceptions allowed on the trial of the case before the jury. The exceptions taken on the plea in abatement having been withdrawn, and no objections having been urged to the declaration on the motion in arrest, we are relieved from the investigation of any questions arising thereon.

The motion to dismiss was properly overruled. The writ on its face appears to have been signed by a proper officer, and a recognizance of bail duly taken. The objections are without foundation in fact, so far as it appears from a personal inspection of the record. To find the facts otherwise, it would be necessary that testimony *aliunde* be received, and this would

be improper on a motion to dismiss, even if it could be received under other modes of pleading. The compiled statutes, p. 242, secs. 4, 5, requiring writs to be signed by a proper officer, and a recognizance to be taken at the time of signing, and providing that if otherwise issued the same on motion shall abate, contemplates the case where such defects are made apparent upon the face of the writ, and can be ascertained by the court on an inspection of the record. If reliance is placed on other testimony to show the writ not duly signed, or recognizance taken, if proper in any case, it must be on a plea in abatement where an issue can be formed under proper pleadings, so that the case can be tried by the court or jury, as the issue shall be closed.

We are, then, brought to an examination of the questions arising on the second bill of exceptions. The action is brought to recover the amount of several calls, or assessments, made on two shares of the capital stock of this company, subscribed for by the defendant after the several acts of incorporation were passed, in 1835 and 1843, and before the act of 1845. That the defendant subscribed that instrument with his own hand, and that the subscription was altered from one share to two by his direction and authority, is found by the jury. It is necessary, however, to sustain this action, that there be an express promise by the defendant to pay the assessments, for the seventeenth section of the act of incorporation not only gives to the corporation the right of making and requiring payment, but also the power of enforcing the payment of those assessments by creating a forfeiture of all previous payments thereon, and this is the only remedy given by the act. And unless an express promise has been made for such payment, the remedy of the corporation is limited to that prescribed by the charter, and they must proceed by a forfeiture of the stock and payments made thereon: *Andover T. Corp. v. Gould*, 6 Mass. 40 [4 Am. Dec. 80]; *New Bedford T. Corp. v. Adams*, 8 Id. 138 [5 Am. Dec. 81]; *Franklin Glass Co. v. White*, 14 Id. 286. And this doctrine has been recognized in this state in the case of *Essex Bridge Co. v. Tuttle*, 2 Vt. 393.

Whether the language used in this subscription is sufficient for that purpose depends upon the intention of the parties, as ascertained by a proper construction of the instrument. It should contain something more than a promise to become a stockholder or proprietor of a given number of shares. But if it contains in its language an acknowledgment of a personal liability thereon, and gives the right to enforce that obligation

by the usual means of enforcing contracts at law, it would be equivalent to an express promise, and no court would hesitate to say that the party intended to create such liability for the purpose of giving to the corporation a cumulative remedy, to that given by the charter. In looking at the subscription, we find it clear in its provisions. There is no ambiguity on its face. It first recites the existence of the charter and the names of the commissioners appointed for opening the books for subscription to its capital stock, "and the subscribers agree to take the number of shares respectively placed against their names." If the agreement rested there, the assessments could be enforced only by forfeiture of their stock, but the instrument contains the further provision, "that the subscribers are held to pay to the amount which shall be assessed, and the company may enforce their claim thereto, with expenses of collection, by sale of the shares, or by suit, or by either of those means." In this provision, it is obvious they intended to give the corporation their personal obligation for such payment, with the right of enforcing that obligation independent of the right of forfeiture of the stock, and an obligation thus created can be enforced in this form of action.

Several objections are urged against the plaintiffs' recovery in this case, not only involving the legal existence of the plaintiffs in their corporate capacity, but also the validity of the subscription itself. That the plaintiffs were duly incorporated, and that an organization in fact was made under their charter, is stated in the exceptions, and is not disputed.

But it is insisted that some of the subscriptions were fictitious, and that the amount required by the act previous to their organization was not raised. The first section of the act of 1845 provides "that the company may organize agreeable to the provisions of the act of 1835, so soon as five hundred thousand dollars shall have been subscribed to the capital stock." It is evident the legislature contemplated *bona fide* subscriptions, and if they were not so, the organization should not have been effected. We are not called upon, however, to decide upon the admissibility of testimony in proof of those facts, independent of those considerations arising out of the charter, or to what extent such evidence would be available in suits of this character. To guard against fraudulent subscriptions, and to see that this provision of the act was complied with, commissioners were appointed under the fourth section of the act of 1835, whose duty it was to open books and receive subscriptions, and when the

amount required was raised, to notify a meeting of the stockholders for the election of directors, and of which they are the inspectors; and they are required to certify, under their hands, the names of those elected, and by the fifth section of the act of 1845, that organization is to be duly certified to the secretary of state; and from the certificate of the secretary, which is made part of the case, it appears that all these requirements of the act have been complied with. As a preliminary question, therefore, before the commissioners could call for an election of directors, and effect that organization, or make their several certificates thereof, they were required to ascertain and find as true that the full amount was raised by subscription, as required by the act. They were a board appointed by the legislature for that specific purpose, as well as to direct in all those preliminary steps necessary for a legal and proper organization of the company. As the act required their certificate of that organization to be made and filed in the office of the secretary of state, that certificate must be considered as conclusive evidence of its organization, as well as of the validity and amount of the subscriptions, so far, at least, as the question of a legal organization of the company is concerned. It could have been for no other object but to produce that effect that the act required that certificate to be made and filed. In the case of *Rex v. The Mayor and Aldermen of London*, 3 Barn. & Adol. 271, Lord Tenterden, C. J., remarked: "That if a matter is left to the discretion of any individual, or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether or not they have exercised their discretion properly. If such a power is given to any one, it is sufficient in common sense for him to say that he has exercised that power to the best of his judgment." The same doctrine was sustained in *Walker v. Devereux*, 4 Paige, 229; *Rex v. The Justices of Norfolk*, 1 Nev. & M. 67; *Clarke v. Brooklyn Bank*, 1 Edw. Ch. 371. On the production of that certificate, therefore, with the other evidence introduced of an organization in fact, their existence as a corporation and their organization under their charter was proved by the best evidence the nature of the case admits, and the certificate is as conclusive upon the validity of the subscriptions and the amount, and on the question of a legal organization, as upon any other preliminary fact which they were authorized to find and certify.

It is also insisted that the verdict in this case is wrong, inas-

much as no evidence was introduced showing that the sum of twenty thousand dollars was expended in the construction of the road, as required by the act of incorporation. The second section of the act of 1835, and the third section of the act of 1843, required the commencement of the construction of the road, and the expenditure of that amount thereon, within five years in one case and three years in the other, or the charter is declared void. The fourth section of the act of 1843 saves from forfeiture so much of the road as shall be built within the time limited by the act, so that that which remains unfinished is alone forfeited. The objection, we think, is not well taken in this action for assessments. For it would be exceedingly inconsistent to say that the corporation must expend that sum in the construction of their road, and at the same time deny them the right and power of collecting their subscriptions for that purpose. That could never have been the intention of the legislature. The charter, in its duration, is perpetual, and this provision of the act is a reservation of the right on the part of the state to cause its charter to be vacated, if the corporation neglects or refuses to exercise its corporate franchises within that period. But this cause of forfeiture may be waived by the state, an illustration of which is found in this charter; a forfeiture accrued under the act of 1835, but was waived by the act of 1843, on this very subject.

It is a matter exclusively between the corporation and the state granting the charter. If they waive the forfeiture, no other person can take advantage of it. If they insist upon the forfeiture as a general rule, the corporation has still its legal existence, until a judgment of ouster is had, under judicial proceedings. "It can not be tried or put in issue, collaterally or incidentally, in any other mode than by direct proceedings for that purpose against the corporation." Until, therefore, this charter is vacated by such proceedings, the corporation has its legal existence, and may enforce payment of its assessments: *People v. Manhattan Co.*, 9 Wend. 351; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; Angell & Ames on Corp. 664, 665, and authorities there cited. That such matter is no defense in an action against one for assessments was decided in the case of *The Waterford and Dublin R. Co. v. Dalbiac*, 4 Eng. L. & Eq. 455.

An important question in this case arises upon the evidence tending to prove that the defendant's subscription was obtained by fraud. The defendant requested the court to charge the jury "that if they believed that fictitious subscriptions had

been obtained previous to the defendant's, and the defendant had been thereby induced to sign for shares, it would be a fraud upon him, and that he would be released therefrom." There was testimony justifying that request, and the neglect or refusal of the court so to charge the jury gives to the party excepting the benefit of that fact, so that the question arises whether that constitutes such a fraud as will avoid this subscription. The court charged the jury "that all private unwritten agreements, made by and with any of the subscribers, inconsistent with the written terms of the subscription, if made at or before signing either with those who preceded the signature of the defendant, or with the defendant himself, were inadmissible, inoperative, a fraud on the other subscribers, on the plaintiffs, and utterly void, and that if they believed the defendant signed the subscription and directed two shares to be annexed to his name, they should find a verdict for the plaintiffs."

It is evident that if an action had been brought against those prior subscribers, on their respective subscriptions, or those who became such, at the time the defendant subscribed, no agreements or arrangement with them, inconsistent with the terms of their subscription, could be received in evidence, in avoidance of their contract. If they signed that subscription, they are bound by its expressed terms and conditions, and if done under an agreement that they should not be liable, and to induce others to sign, they became parties to the fraud, and would not be permitted to avail themselves of their own wrongful acts to avoid their contract. They would be estopped to deny its binding character and obligation, and be required to discharge to the corporation and all interested therein that obligation which they have assumed, according to its terms. In depriving them of such matters in defense, the law makes the subscriptions *bona fide*, and requires them to fulfill and answer those expectations and inducements which they have held out for the purpose of procuring other subscribers. This doctrine is enforced by considerations of public policy, as well as of good faith, and is now considered as settled law in this state.

This was the doctrine established in the case of *Blodgett v. Morrill*, 20 Vt. 509, where it was ruled that such testimony was not admissible, when offered by those with whom such arrangements were made, and who were parties to such fraudulent attempt. And when this testimony is offered by those who subsequently signed the subscription, who were not parties to the fraud, and who thereby were induced to become subscribers, the testimony be-

comes equally inadmissible. For as the prior subscribers are held bound to their subscription, and to carry out to the letter every inducement they have held forth, no fraud has been practiced upon them to make their subscriptions. And they have no reason to complain, for they see fulfilled and answered every inducement that was held out to operate upon them. The case is made to stand, in that respect, in the same situation in which they were induced to believe it stood when they subscribed for the stock. In the case of *Blodgett v. Morrill*, *supra*, it was also very properly said "that if such prior agreements were binding and had been acted upon and the subscriptions discharged, yet it would not be such a fraud as would relieve the defendant, as each subscription is an independent contract; and one having no legal right to depend upon another." While the common law gives to all relief against fraud, it at the same time requires of the other party the exercise of all reasonable care and prudence in observing the ordinary and accessible means of information, and he has no reason to complain of imposition or surprise, where he has been wanting in that care and attention to all those particulars which are within his reach and observation, and by which that imposition might have been avoided: *Ormrod v. Huth*, 14 Mee. & W. 651, and note to American cases; 2 Kent's Com. 622, last edition. It is to be observed that the case does not state, nor was there an attempt to prove in the case, any false representations or statements made to the defendant at the time his subscription was made. He was not, therefore, induced to make the same by any considerations of that character. And the private agreement with former subscribers, even if acted upon, would not be a fraud that would release the defendant, as there is wanting, not only the exercise of ordinary observation and care in obtaining that information and knowledge, but on the more definite ground that the defendant's subscription was an independent contract, in no way connected with the others, and from which no matter could arise creating an inducement operating upon the defendant which in law will enable him to avoid his subscription. He has no more reason to complain than any purchaser of property can make complaint because similar commodities were sold to others under different arrangements from that made with him. On the ground of fraud, therefore, the court properly ruled the testimony inadmissible; and independent of fraud, the testimony was inadmissible as contradicting and altering the terms of a written agreement.

There is no want of mutuality to render this contract binding.

The provision in the contract, that until the organization of the company the subscription was subject to the acceptance or rejection of the commissioners, does not affect the defendant's obligation. It does not appear that it was ever rejected by the commissioners, and when the company became organized, and no act was done disaffirming the subscription, it became binding on them, and entitled the defendant to the stock, and the corporation to the assessments: 2 Kent's Com. 465, note; *Townsend v. Alexander*, 2 Ohio, 19.

It is further insisted that the defendant is discharged from his subscription, as it was made before the passage of the act of 1845, and that by the provisions of that act a fundamental change has been made in the charter, to which he has never assented. The original charter, granted in 1835, was passed with a capital of two millions, with liberty to increase that amount to three millions, for the purpose of constructing a railroad along the valleys of the Connecticut and Passumpsic rivers, from the southern to the northern boundaries of the state. The act of 1845 effected a change in the charter of the corporation as it existed under the acts of 1835 and 1843, by altering the southern terminus of the road, and limiting it at or near the mouth of White river, instead of the southern boundary of the state, and authorizing an organization of the company "as soon as five hundred thousand dollars shall have been subscribed to the capital stock."

As a great portion of the road to be constructed under their original charter was surrendered, and the necessity of that amount of capital obviated, the first alteration very properly gave rise to the last. The subscription was signed or changed from one to two shares but a few weeks before the session of the legislature at which the alteration was made. And it is evident, by looking at the subscription, and the conditions therein expressed, that the change was sought for as beneficial to the corporation, and that the subscription was made with a view to that alteration in the charter. It was not to be binding unless the assessments were appropriated for the construction of that portion of the road lying between Derby line and the mouth of White river. The assent and even requirement of these subscribers to these alterations is to be inferred therefrom, and it is not for them to object to such alterations as were necessary to effect their common object, and which permit the application of the money to the purpose, and for the object for which it was specifically subscribed.

Under this view of the act of 1845, we are not called upon to

express any opinion upon the question whether any or what subsequent change in a charter will have the effect to discharge subscribers to the stock from the payment of their assessments. The cases in Massachusetts and New Hampshire are in conflict with the cases of *The London and Brighton R. Co. v. Wilson*, and *The Same v. Fairclough*, 37 Eng. Com. L. 316, and the question is of too much importance to be disposed of in a case where its investigation and decision is not necessarily required.

The judgment of the county court must be affirmed.

REMEDY BY SALE OF DELINQUENT STOCK IS CUMULATIVE, and does not impair the right to compel payment by action: *Selma etc. R. R. v. Tipton*, 39 Am. Dec. 344, and note collecting prior cases; *Hightower v. Thornton*, 52 Id. 412; but see *Andover T. Corp. v. Gould*, 4 Id. 89; *New Bedford T. Corp. v. Adams*, 5 Id. 81.

THAT CORPORATION HAS NO LEGAL EXISTENCE IS NO DEFENSE TO SUIT FOR SUBSCRIPTION: *Chester Glass Co. v. Dewey*, 8 Am. Dec. 128; *Selma etc. R. R. v. Tipton*, 39 Id. 344.

AGREEMENTS EXEMPTING SUBSCRIBER TO STOCK FROM LIABILITY ON SUBSCRIPTIONS CAN NOT BE MADE: Note to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 99; *Hibernia T. Corp. v. Henderson*, 11 Id. 593.

ALTERATION OF CORPORATE CHARTER AS AFFECTING LIABILITY FOR ASSESSMENTS AND SUBSCRIPTIONS: See *Middlesex Turnpike Corp. v. Swan*, 6 Am. Dec. 139; *Irvin v. Turnpike Co.*, 23 Id. 53; *Milford etc. Co. v. Brush*, 39 Id. 78.

THE PRINCIPAL CASE WAS CITED in *Callanan v. Judd*, 23 Wis. 353, to the point that parol evidence that it was part of a written agreement upon which a mortgage made by a railroad company was delivered that the road should be constructed on the route which had been selected was inadmissible.

TROW v. VERMONT CENTRAL RAILROAD COMPANY.

[24 VERMONT, 487.]

FENCES AND CATTLE-GUARDS MUST BE ERECTED AND MAINTAINED by the Vermont Central Railroad Company upon their road, sufficient to prevent horses and other animals from passing thereon.

CARE AND DILIGENCE REQUIRED OF RAILROAD CORPORATION IN CONSTRUCTING FENCES AND CATTLE-GUARDS depends upon the locality of the road and the place through which it passes.

NEGLECT TO CONSTRUCT FENCES AND CATTLE-GUARDS RENDERS RAILROAD CORPORATION LIABLE for injuries arising solely from that cause, when the omission was for a considerable distance in a place so public and common that it must know and reasonably expect that without such precautions injuries to horses and cattle will naturally and frequently arise.

OWNER PERMITTING HORSE TO RUN AT LARGE UPON HIGHWAY IS CHARGEABLE WITH SAME DEGREE OF NEGLIGENCE, when he knows of the exposure and liability to injuries from passing trains, as is a railroad corporation in not constructing its fences and cattle-guards; and as much care and prudence is required of the owner in keeping his property from exposure to such injuries as is required of the corporation in guarding against their commission.

MUTUAL NEGLIGENCE OF PLAINTIFF AND DEFENDANT DEFEATS ACTION, where the negligence of each party was the proximate cause of the injury.

NEGLECT OF PLAINTIFF DEFEATS ACTION WHERE HIS NEGLIGENCE WAS PROXIMATE and that of the defendant remote.

NEGLECT OF PLAINTIFF DOES NOT DEFEAT ACTION WHERE HIS NEGLIGENCE WAS REMOTE and that of the defendant proximate.

NEGLECT OR EVEN POSITIVE WRONG OF PLAINTIFF WILL NOT DEFEAT ACTION, if at the time when the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence.

NEGLECT IS MIXED QUESTION OF LAW AND FACT, upon which it is the duty of the court to specifically instruct the jury.

TRESPASS on the case for negligence of the defendants in not erecting and maintaining fences and cattle-guards upon their railroad, whereby the plaintiff's horse strayed upon their track and was killed. The plaintiff's evidence tended to show that there were usually many cattle and horses upon the public highway and in the uninclosed land near the railroad track, and that several accidents had occurred there, where the plaintiff's horse was killed. That for a distance of about seventy-five rods the track was wholly unfenced, and the highway crossed the track within this distance, and there was no cattle-guard or obstruction to prevent animals from passing from the highway upon the track. There was no evidence to show any negligence in the management of the train or engine when the injury occurred. The defendants' evidence tended to prove that the horse had been several times previously upon the highway with the plaintiff's knowledge and assent. The instructions asked by the defendants and those given by the court are stated in the opinion. The verdict was for the plaintiff. Exceptions by the defendants.

F. V. Randall and F. F. Merrill, for the plaintiff.

Peck and Colby, for the defendants.

By Court, ISHAM, J. The declaration in this case, in substance, states that the defendants are the owners and occupiers of a certain railroad passing through "Falls Village," in the

town of Northfield, and by the side of and across a public highway leading through that village; and that being such owners and occupiers, it was their duty to construct and maintain fences by the side of their road suitable to prevent cattle and other animals from passing upon the railroad track; and also, for the same purpose, to erect and maintain suitable cattle-guards at all farm and road crossings. It is averred that the defendants have neglected their duty in erecting fences by the side of their road through that village, and in constructing such cattle-guards; and that in consequence of this neglect the plaintiff's horse was found upon the railroad track, and was so injured as to be rendered wholly worthless, by being run upon by an engine of the defendants while in the use of their road.

It is to be observed that the plaintiff has not in his declaration, nor by evidence on the trial, attempted to charge the defendants with any neglect or want of care in conducting and managing the engine at the time the injury was committed. We are therefore to assume in this investigation that the train was properly conducted, and that there was in this respect the exercise of that reasonable care and prudence on the part of the defendants and their agents which the law requires, at the time the injury was committed.

The case on the part of the plaintiff must therefore rest upon a duty imposed by law upon the defendants to erect and maintain such fences and cattle-guards upon their road as will prevent horses and other animals from passing thereon, and upon proof that the injury was occasioned by a neglect on their part to perform that duty.

That a duty of that character rests upon this corporation must be considered as settled in this state, by a decision of this court in the case of *Quimby v. Vt. Cent. R. R. Co.*, 23 Vt. 393. The court there held "that the expense of fencing rests primarily upon the company," and consequently can be taken into consideration by the commissioners in the assessment of damages; and when this duty exists, an action will lie for any injury arising solely from any neglect therein.

Manifestly that duty becomes more or less imperative, and its performance required greater or less sufficiency and care, depending upon the locality of the road and the place through which it passes. In places thickly settled, and where animals for domestic use and purposes are necessary, much greater diligence and care is required of a railroad corporation in the construction of their fences and guards than would be required in

places thinly settled or remote from individual habitations, as the danger of injuries from such causes is proportionably diminished. That would be considered gross negligence in the one place which would not be so considered in the other.

If in this case the injury arose solely from the neglect of the defendants to erect and maintain suitable fences and guards for the protection of animals, the charge of the court, so far as the defendants are concerned, is unobjectionable. They have no reason to complain of the degree of diligence and care which the court required them to exercise, for under the instructions given they were held liable only in cases of gross neglect in making and maintaining such erections. If there were error in this, it was in favor of the defendants, and is that for which they have no cause of exception. The jury have found the defendants guilty of gross neglect in the performance of this duty; and although this neglect may not be considered the proximate but the remote cause of the injury, their liability is a necessary consequence, unless there are some other facts existing in the case otherwise affecting it.

The duty of maintaining fences and erecting cattle-guards for such purposes is imposed upon the corporation, not only as a matter of safety in the use of their road and running their engines thereon, but also as a matter of security to the property of those living near and contiguous to the road. And this arises from the consideration that they must know and reasonably expect that without such precautions such injuries will naturally and frequently arise. And when, for the distance mentioned in this case, no precautions of that kind were used upon this road, and in a place so public and common, we think, as a matter of law, there was that neglect which will render the corporation liable for injuries arising solely from that cause.

The important question presented in this case arises upon the evidence introduced by the defendants, and the charge of the court thereon. The defendants introduced evidence showing that the plaintiff's horse had been several times before in the highway, and with the knowledge and consent of the plaintiff. And the court were requested to charge the jury "that if the plaintiff's horse, at the time of the injury, was in the highway with the knowledge and consent of the plaintiff he could not recover."

As there was evidence in the case tending to prove that fact, and from which the jury could properly have made such inference, the defendants had a right to insist upon a charge of the

court, agreeable to the request; and the neglect of the court so to charge the jury gives to the defendants the benefit of that fact, in this examination of the case, to the same extent as if found by the verdict of the jury. So that the investigation of this case leads to the inquiry, What effect is had upon the liability of the defendants by the fact that the plaintiff's horse was permitted to run and remain upon the public highway in a manner to be exposed to the dangers and injuries arising from the defendant's use of the road?

It is very evident that if the defendants are chargeable with gross or any other degree of neglect, from their want of proper care in making and constructing their fences and cattle-guards, arising from the consideration that they must have known and expected such casualties and injuries would arise, the plaintiff is chargeable at least with the same degree of neglect, in permitting his horse to run upon the highway, knowing of his exposure and liability to injuries of this character; and it is as reasonable to charge the plaintiff with the knowledge and expectation that such injuries would arise as the defendants, and also to require of the plaintiff the exercise of as much care and prudence in keeping his property from such exposure to such injuries as is required of the corporation in guarding against their commission. From the facts, therefore, in the case, the plaintiff was as much in fault and is equally chargeable with neglect as the defendants; and in each case their negligence was the remote cause of the injury, and equally contributed to that result.

This is as favorable a view of the case as can be taken on the part of the plaintiff, for in reality the difficulty in the case, on his part, is increased from the consideration that his horse was upon the highway without right. Chancellor Kent says "that the public have no rights in a public highway, but a right of way or passage; and if cattle are placed in a public highway for the purpose of grazing, and escape into an adjoining close, the owner of the cattle can not avail himself of the insufficiency of the fences in excuse of the trespass:" 3 Kent's Com. 536. And this provision is enforced by statute in this state: Comp. Stat. 519, sec. 16. In England, the so placing cattle for grazing would be a trespass, and an action of trespass would be sustained by the adjoining proprietors: *Lade v. Shepherd*, 2 Stra. 1004; *Stevens v. Whistler*, 11 East, 51; and such has been the decisions in repeated instances in this country: *Stackpole v. Healy*, 16 Mass. 33 [8 Am. Dec. 121]; *Peck v. Smith*, 1 Conn.

103 [6 Am. Dec. 216]; *Makepeace v. Worden*, 1 N. H. 16; *Babcock v. Lamb*, 1 Cow. 238; *Griffin v. Martin*, 7 Barb. 297; 2 Smith's Lead. Cas. 176, 184.

This leads our investigation to the question whether an action can be sustained when the negligence of the plaintiff and the defendant has mutually co-operated in producing the injury for which the action is brought. On this question the following rules will be found established by the authorities: When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words "proximate cause" is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason "that as there can be no apportionment of damages, there can be no recovery." So where the negligence of the plaintiff is proximate and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason that the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These principles are sustained by *Hill v. Warren*, 2 Stark. 577; *Munroe v. Leach*, 7 Met. 274; *Parker v. Adams*, 12 Id. 415 [46 Am. Dec. 694]; *Brownell v. Flagler*, 5 Hill, 282; *Brown v. Maxwell*, 6 Id. 592 [41 Am. Dec. 771]; *Williams v. Holland*, 6 Car. & P. 23. On the other hand, when the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. So in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the road, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train, and if for want of that care the injury arose, they are liable.

Such was the case of *Davies v. Mann*, 10 Mee. & W. 548, where one unlawfully left his fettered donkey in the highway, and it was killed, by the negligence and carelessness of the defendant in the management of his horses and wagon; Lord

Abinger "held, that he might recover, though the animal was improperly there." In that case the plaintiff was guilty of a wrong in putting his donkey in the highway, and of negligence in permitting him to remain there; but it would probably be considered remote, as the injury arose more directly from another cause. But the neglect of the defendant was proximate, as it occurred when the injury was committed; and as it might have been avoided by the exercise of reasonable care and prudence, he was held liable. In the case of the *Mayor of Colchester v. Brooke*, 53 Eng. Com. L. 376; S. C., 1 Smith's Lead. Cas. 312, it was held that a person was not justified in running his vessel upon a bed of oysters, improperly placed in the channel of a navigable river, and which created a public nuisance. The wrong and negligence of the plaintiff, in placing and permitting that deposit to remain in that situation, did not justify the injury committed by the defendant, when it could have been avoided by the exercise of reasonable diligence and care. And this rule is sustained in the following cases: *Dimes v. Petley*, 69 Eng. Com. L. 282; *Marriott v. Stanley*, 1 Man. & G. 568; *Bird v. Holbrook*, 4 Bing. 628; *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29; *Bridge v. Grand Junction R. Co.*, 3 Mee. & W. 244; *Butterfield v. Forrester*, 11 East, 60; *Marriott v. Stanley*, 1 Scott N. R. 392; *Raisin v. Mitchell*, 9 Car. & P. 613.

These principles have an important application to the case under consideration. The negligence which caused the injury in this case can not strictly be said to be proximate in either of the parties, but is remote in both cases. It was remote on the part of the corporation; for it is found in the case that there was no negligence on their part in the management of the train or engine when the injury arose, but the neglect existed in not having previously made their fences and cattle-guards. It was also remote on the part of the plaintiff in permitting his horse to remain in the highway, exposed to such injury, after it first came to his knowledge. The injury arose from the combined result of both causes. If either of the parties had done their duty, and conformed to the requirements of the law, the injury would not have been sustained. In such case no action can be sustained by either of the parties, no more than in the case where their mutual negligence is the proximate cause of the injury; for the same reason exists in the one case that exists in the other. From the nature of the case there can be no apportionment of damages, and no rule can be laid hold of that settles what one shall pay more than the other. The rule is generally

given in the authorities that in cases of mutual neglect, where it is of the same character and degree, no action can be sustained. This principle has uniformly been sustained in this state for injuries arising from negligence on the highways: *Noyes v. Morristown*, 1 Vt. 353; *Briggs v. Guilford*, 8 Id. 264; *Allen v. Hancock*, 16 Id. 230. And that the rule is the same in relation to the use of railroads as to highways has been directly held in *Beers v. The Housatonic Railroad Co.*, 19 Conn. 567.

Upon the facts in this case the court charged the jury "that if the plaintiff's horse was in the highway by the permission of the plaintiff, yet if the location of the defendants' road was such that by reason of the want of fences and cattle-guards it was rendered so unsafe and dangerous as that the want of such fences and cattle-guards amounted to gross and culpable neglect on the part of the defendants, and thereby the plaintiff's horse was killed, the defendants would be liable; but that if the plaintiff and defendants were equally negligent, the plaintiff could not recover." The difficulty, under this charge, arises from the want of more specific instructions as to the negligence of the plaintiff, and what would constitute such negligence. Simply to say that if both the parties were equally negligent the action can not be sustained, leaves the whole subject of investigation too indefinite and general. The question of negligence is a mixed question of law and fact, upon which it was the duty of the court specifically to instruct the jury. Where facts in the case are admitted, or where there is testimony tending to prove facts, it is the duty of the court, particularly when requested, to instruct the jury whether those facts, if they find them to be true, constitute that negligence which will defeat the action.

So in this case, as there was testimony proving that the plaintiff's horse was in the highway with his knowledge and consent, and had previously so been, the defendants had a right to request, and it was the duty of the court to charge the jury specifically, and as a matter of law, that that fact, if true, was that degree of negligence on his part which rendered the case one of mutual negligence; and if from that mutual negligence the injury arose, that the action could not be sustained. For the want of this, we think there was error, and that the judgment of the county court must be reversed.

RAILROAD COMPANY'S LIABILITY FOR INJURING CATTLE TRESPASSING ON TRACK: *Tonawanda R. R. v. Munger*, 49 Am. Dec. 239, and note 261; *Perkins v. Eastern R. R.*, 50 Id. 589; *Vandegrift v. Rediker*, 51 Id. 262; *Munger*

v. *Tonawanda R. R.*, 53 Id. 384, and note; *Danner v. South Carolina R. R.*, 55 Id. 678. The principal case has been quoted with approval in *Norris v. Androscoggin R. R.*, 39 Me. 277; *Kerwhacker v. Cleveland etc. R. R.*, 3 Ohio St. 197, in reference to the care required of railroads in erecting fences and cattle-guards; and see also the principal case cited, *Cleveland etc. R. R. v. Elliott*, 4 Id. 477.

RECOVERY FOR INJURIES WHERE BOTH PLAINTIFF AND DEFENDANT HAVE BEEN GUILTY OF NEGLIGENCE: See the question of contributory negligence discussed at length in *Freer v. Cameron*, 55 Am. Dec. 663, and note. The rules laid down by the principal case have been frequently approved. Thus, the proposition that "when there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained," is quoted with approval in *Timmons v. Ohio R. R.*, 6 Ohio St. 109; *Haley v. Chicago etc. R'y*, 21 Iowa, 25; *Button v. Hudson River R. R.*, 18 N. Y. 257; *Needham v. San Francisco etc. R. R.*, 37 Cal. 423; *Reynolds v. Hindman*, 32 Iowa, 149; *Stucke v. Milwaukee etc. R. R.*, 9 Wis. 214. The rule that "where the negligence of the plaintiff is proximate and that of the defendant remote * * * no action can be sustained," is likewise quoted in *Needham v. San Francisco etc. R. R.*, 37 Cal. 422; *Stucke v. Milwaukee etc. R. R.*, 9 Wis. 214, 217; *Haley v. Chicago etc. R'y*, 21 Iowa, 25; *Button v. Hudson River R. R.*, 18 N. Y. 258; and cited in *Callahan v. Warne*, 40 Mo. 136; *Hyde v. Town of Jamaica*, 27 Vt. 458; *Cleveland etc. R. R. v. Elliott*, 4 Ohio St. 477; *Murphy v. Deane*, 101 Mass. 466; *Northern Cent. R'y v. State*, 29 Md. 436; *Foster v. Holly*, 38 Ala. 85. If, then, the injury was the result of carelessness of the plaintiff, and could have been avoided by the exercise of ordinary vigilance, he can not recover: *President etc. of Ohio etc. R. R. v. Gullett*, 15 Ind. 487; and see *Beatty v. Gilmore*, 55 Am. Dec. 514. And the rule that "when the negligence of the defendant is proximate and that of the plaintiff remote the action can then well be sustained, although the plaintiff is not entirely without fault," is also quoted and approved in *Cranston v. Cincinnati etc. R. R.*, 1 Handy, 207; *Haley v. Chicago etc. R'y*, 21 Iowa, 25; *Needham v. San Francisco etc. R. R.*, 37 Cal. 422; *Kerwhacker v. Cleveland etc. R. R.*, 3 Ohio St. 194; *Stucke v. Milwaukee etc. R. R.*, 9 Wis. 214; and cited in *Mills v. Steamboat Nathaniel Holmes*, 1 Bond, 360; *Cleveland etc. R. R. v. Elliott*, 4 Ohio St. 477; *Murphy v. Deane*, 101 Mass. 465; *Northern Cent. R'y v. State*, 29 Md. 436; *State v. Manchester etc. R. R.*, 52 N. H. 556; *Vicksburg etc. R. R. v. Patton*, 31 Miss. 193. And "if there be negligence on the part of the plaintiff, yet if at the time when the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury," is also a proposition similarly quoted in *Mills v. Steamboat Nathaniel Holmes*, 1 Bond, 360; *Needham v. San Francisco etc. R. R.*, 37 Cal. 422; *Kerwhacker v. Cleveland etc. R. R.*, 3 Ohio St. 195; *Stucke v. Milwaukee etc. R. R.*, 9 Wis. 214; and cited in *Thomas v. Kenyon*, 1 Daly, 143; *McGrath v. Hudson River R. R.*, 19 How. Pr. 224; *President etc. of Ohio etc. R. R. v. Gullett*, 15 Ind. 487; *O'Brien v. McGlinchy*, 68 Me. 558; *Hurd v. Rutland etc. R. R.*, 25 Vt. 123. A wrong-doer is not without the pale of the law: *Cranston v. Cincinnati etc. R. R.*, 1 Handy, 204, citing the principal case to this point.

NEGLECTANCE, WHETHER QUESTION OF LAW OR FACT: See *Herring v. Wilmington etc. R. R.*, 51 Am. Dec. 395. Negligence is a mixed question of law and fact: *Wright v. Malden etc. R. R.*, 4 Allen, 289; *Cleveland etc. R. R. v. Terry*, 8 Ohio St. 584; *Detroit etc. R. R. v. Van Steinburg*, 17 Mich. 118, 120, all citing the principal case to this point.

FARMERS' AND MECHANICS' BANK v. RATHBONE.

[26 VERMONT, 19.]

BILLS ARE NOT ACCOMMODATION PAPER, AND ACCEPTOR IS PRIMARILY LIABLE, when the drawer has an open account with the acceptor at the time for goods consigned to the latter to be sold on commission, and the bills were drawn and accepted with the understanding that they were to be paid by the acceptor, and the amount entered into the general account; nor is the legal character of the bills affected by any alteration of the balance of the account, nor by the fact afterwards ascertained that at the time of the acceptance the drawer was indebted to the acceptor.

RELEASE OF DRAWER OF BILL WILL NOT DISCHARGE ACCEPTOR, where the bill is not accommodation paper, but is drawn and accepted against the drawer's account for goods consigned to the acceptor; the acceptor is the party primarily liable, and the drawer is considered only as his surety or guarantor.

INDORSEE OF BILL HAS RIGHT TO HOLD PARTIES LIABLE ACCORDING TO THEIR RELATIVE POSITIONS THEREON, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral, where he takes the bill for value and before maturity, in ignorance that it was given for accommodation; and this right is unaffected by any subsequently acquired knowledge that the bill was so given.

RELEASE OF DRAWER OF BILL WILL NOT DISCHARGE ACCEPTOR at law or in equity, where the bill was taken for value and before maturity, without notice that it was given for accommodation, although notice be subsequently acquired that it was so given.

ASSUMPSIT against the acceptor on two bills of exchange. One Caleb E. Barton having been in the habit of consigning cheese to the defendant to be sold on commission, and of drawing his drafts for the proceeds, drew the bills in suit on the defendant, which were duly accepted. At the time the bills were drawn and accepted, the state of the drawer's account was not known, but both the drawer and the defendant thought there was a balance due the drawer. It was afterwards discovered that Barton had already overdrawn his account, and was indebted to the defendant at the time when the bills were drawn. The plaintiffs became the holders of the bills in due course of business, for value, and before maturity, and without knowledge of the fact that they were drawn against an overdrawn account, discounting them under the representations of Barton, and in the belief that the defendant had property or funds of Barton sufficient to meet the bills when they were discounted and accepted; and the plaintiffs never learned the contrary until after they became the owners and holders of the bills. Suit was

afterwards brought against the drawer, who paid a part of the balance due in consideration of being released entirely from liability on the bills. The defendant had no knowledge of the release of the drawer previous to the release. Other facts are stated in the opinion. The plaintiffs sought to recover the unpaid balance on the bills. Judgment for the defendant, and exceptions by the plaintiffs.

Salmon Wires and W. W. Peck, for the plaintiffs.

A. Peck and G. F. Bailey, for the defendant.

By Court, ISHAM, J. This action is brought on two bills of exchange drawn by Caleb E. Barton on the defendant, Henry Rathbone, on the city of New York; both of which were duly accepted, and before maturity were discounted, and transferred by indorsement to the plaintiffs. When the bills matured they were dishonored, duly protested, and notice thereof given to the drawer.

On the trial of the case, at the circuit, the defendant insisted that the bills were accommodation bills; and upon the facts stated in the bill of exceptions, he now insists that the bills are of that character, that the drawer is the person primarily liable, that the acceptor stands as his surety, and that the release of the drawer, by the plaintiffs, operates as a discharge of the defendant as acceptor. It is admitted that if these bills are not accommodation bills, but are really bills for value, the release will not affect the liability of the acceptor. It will discharge all persons intermediate between the holders and drawer, but not those prior on the bills, nor those on whom rests a primary or absolute liability to pay them: *English v. Darley*, 2 Bos. & Pul. 61; Bailey, J., in *Claridge v. Dalton*, 4 Mau. & Sel. 226; Chit. Bills, 451.

We are not satisfied that these bills are to be treated as accommodation papers. It is true, the fact is found in the case "that at the maturity of the bills the drawer was indebted to the acceptor on account, apart from the bills in suit, and that the latter had no funds in his hands of the former, wherewith to meet them." But in connection with this statement, it equally appears from the exceptions that during the season of 1844, the drawer, at different times, consigned to the defendant as commission merchant, for sale on his account, a quantity of cheese, the gross proceeds of which amounted to seven thousand eight hundred and forty-eight dollars and seventy-eight

cents; and from the statement in the account of sales we perceive that a much larger amount than the sum of these bills was realized therefrom after these acceptances were given. The account arising from the sale of this property commenced in July, 1844, and closed in November of that year. There has been no statement of that account rendered, or balance ascertained by the parties. As between them, the whole account remains open and subject to their future liquidation. While this account was accruing, these bills were drawn and accepted, obviously and with the understanding that they were to be paid by the defendant, and the amount so paid be entered into their general account.

During that period they doubtless anticipated that the balance would be sufficient to pay these bills, and have been respectively disappointed in the amount finally realized therefrom; so that there is now a balance due the acceptor, as stated in the account of sales. But as these bills, at first, were drawn upon property consigned to the acceptor, and he accepted them with the same means of knowledge which the drawer had, and thereby assumed the primary obligation to pay them, there is no propriety in treating the bills otherwise than as creating obligations of that character, after they have passed, in due course of business, into the hands of an indorsee. In so treating them, we are manifestly carrying into effect the mutual intention of the parties when the bills were drawn and accepted; for it is distinctly stated in the case that both the drawer and the drawee supposed and believed that there were funds sufficient in the hands of the drawee to pay them at maturity, and under that belief the drawer made such representations to the plaintiffs at the time of their indorsement and discount.

The legal effect and character of bills of exchange, so drawn and accepted, is not changed or affected by any alteration of the balance of the account, nor even by the fact, if it should be afterwards ascertained, that there was an indebtedness at the time of the acceptance from the drawer to the acceptor. This principle is fully illustrated by the case of *Bagnall v. Andrews*, 7 Bing. 217. Indeed, the facts in that case, and the principles there established, have such a direct application to this case, that we can not consider these bills otherwise than as bills for value, without entirely disregarding the authority and principles of that decision. In that case, when the bill was drawn, the drawer had an open account with the acceptor for goods which he was in the course of sending to him for sale; neither

of them at that time knew the state of the account; "and it afterwards turned out that the drawer was, at the time of the acceptance, indebted to the acceptor, instead of the acceptor being indebted to the drawer." Before the bill became due, the drawer became bankrupt, and indorsed the bill to the plaintiff, who was ignorant that an act of bankruptcy had been committed. The drawer, being called as a witness, was objected to as being interested, on the ground that this was an accommodation bill, and that if the plaintiff recovered, he would be responsible to the defendant, not only for the amount of the bill, but for the costs of that suit. Tyndal, C. J., after remarking that such consequences would follow if this was an accommodation bill, and that the witness would be incompetent, observed that "we think, upon the facts in the case, the bill was not an accommodation bill. At the time it was drawn, the drawer had an open account with the defendant for goods sent, and which he was then in the course of sending to him for sale. The drawer might, at that time, reasonably expect that the acceptor would pay the bill out of funds that might be in his hands when the bill arrived at maturity; for the evidence is express, that at the time the bill was drawn, neither the drawer nor acceptor knew the state of the account. A bill so drawn and accepted can not be treated as an accommodation bill; nor, consequently, is there any implied obligation, on the part of the drawer, to indemnify the acceptor against the costs of any action which may be brought against him:" 1 Phill. Ev. 61; *Bank of Montgomery v. Walker*, 9 Serg. & R. 237 [11 Am. Dec. 709].

If that case is to be treated as sound in principle, it makes a final disposition of the case under consideration; for under that authority, these bills can not be considered as accommodation bills, but must be treated as bills for value; the acceptor being the party primarily liable, and the drawer considered only as his surety or guarantor. In such case it was properly remarked that the release of the drawer was a relinquishment merely of so much security, which the plaintiffs had for the payment of the debt, and which in no event can affect the liability of the acceptor.

It is very evident, also, that the plaintiffs could have sustained no action against the drawer of these bills, unless they had been duly protested and notice given. This principle is founded on the consideration that a primary liability for their payment rests only upon the acceptor; while that of the drawer

is contingent and collateral, and rises upon the default of the acceptor. The necessity of protest and notice, in such cases, is not avoided by a fluctuating balance in their accounts, nor even by the fact, where there exists an open account, that there is an indebtedness from the drawer to the acceptor: *Orr v. Maginnis*, 7 East, 359; *Blackhan v. Doren*, 2 Camp. 503; *In re Brown*, 2 Story, 521; Story on Bills, sec. 311; 2 Smith's Lead. Cas. 29; Smith's Merc. L. 315; *United States v. Bank of Metropolis*, 15 Pet. 393.

But if these bills are to be regarded strictly as accommodation bills, the same result, we think, must follow. In such case it is insisted that the drawer is the person primarily liable; that the acceptor is to be treated as his surety, and that the holder of the bills is bound so to regard and deal with them, notwithstanding the terms of the bill, whenever he has notice that the acceptance was for accommodation, whether that notice was received at the time he took the bills or at any subsequent period.

It is proper to observe that this question does not now arise between the drawer and acceptor; as between them, the consideration may be inquired into and the true relation of the parties shown; but the question is presented in a case between the acceptor and an indorsee for value, without notice that the bill was for accommodation at the time he became the holder. When these bills were received by the plaintiffs, they were invested with those legal rights, and became subject only to those duties, that arose from what appeared on the face of the bills. Their legal effect and the relative liability of the drawer and acceptor could not be changed or altered by any fact not then appearing.

These principles have a peculiar application to bills of exchange, as they are designed for commercial purposes; and their application is required to impart to them that credit and currency which is necessary to insure the purposes for which they were intended. At the time the plaintiffs became indorsees they had the right, on the one hand, and were bound on the other, both at law and in equity, to regard the acceptor as primarily liable, and the drawer as his surety; they could have released, compounded with, or given time to the drawer, without in any way affecting their right to hold the ultimate liability of the acceptor: Story on Bills, secs. 429, 430; *United States v. Bank of Metropolis*, 15 Pet. 393; *Adams v. Wordley*, 1 Mee. & W. 374. Such being their right at the time they became the holders of the bills, there is no propriety or authority in saying

that that right can be subsequently changed or affected by a mere notice from the acceptor to the holder that the drawer had neglected to provide funds for the payment of the bills; or by any act of the drawer and acceptor to which the plaintiffs were not a party, and to which they have never given their assent: Theo. on Pr. & Sur. 216.

The plaintiffs, as holders of these bills, were not subject to any of the equities existing between the original parties, and without their assent those equities can not be imposed upon them. The case of *Mallett v. Thompson*, 5 Esp. 178, was an action by an indorsee against the maker of an accommodation note for the payee. The holder received part payment, under a composition from the payee, and covenanted not to sue him, which is a virtual release, knowing when he received the bill that it was given for accommodation. Lord Ellenborough ruled that the maker was liable, notwithstanding the payment and release; for his liability on the face of the note was primary and principal, and that of the indorsers was collateral and secondary; and whatever may be their liabilities between themselves, such was their liability to the holder. It was also held that the release would have no effect between the maker and payee; for whatever the maker was compelled to pay he might call upon the payee to repay; the release in no way disturbed their relations. On the application of the same rule to this case, whatever the acceptor may be compelled to pay he can call upon the drawer to repay, notwithstanding the release; for their relations are not disturbed by its execution. It is evident, also, in this case, from the release itself, that a discharge of the bill was not intended by the parties, but simply a release of the drawer, by the holders, from any further claim which they had personally on him, leaving the holders to pursue their remedy against the acceptor, as the party primarily liable: Story on Prom. Notes, sec. 423.

In the case of *Laxton v. Peat*, 2 Camp. 185, and *Collott v. Haigh*, 3 Id. 281, a different doctrine was applied to accommodation bills, where the holder, at the time he received the bills, knew that they were for the accommodation of the drawer. Lord Ellenborough remarked "that as it was an accommodation bill, of which all parties had notice, the acceptor can only be considered as a surety for the drawer;" and the acceptor was discharged by time being given the drawer. If these cases can be sustained on principle, they have no application to this case; for it may be said with more propriety that if one take a bill of exchange, knowing at the time that it was for accommodation,

he thereby assents to receive and hold it subject to that equity of the parties; while no such suggestions can be made in this case, as these plaintiffs had no such notice, when the bills were received and discounted.

The doctrine of those two cases was, however, subsequently shaken by Justice Gibbs, in *Kerrison v. Cooke*, 3 Camp. 362, and was afterwards overruled in the common pleas, in the case of *Fentum v. Pocock*, 5 Taunt. 192, in which Mansfield, C. J., observed "that the case of *Laxton v. Peat* was the first in which it was held that the acceptor was not the first and last person compelled to pay the bill to the holder; and that they were compelled to differ, and hold that it is impossible to consider the acceptor of an accommodation bill in the light of a surety for the drawer; and that if the holder had known, in the clearest manner, that at the time of giving the bill it was for accommodation, it would make no manner of difference." With this view of the case, Heath and Chambre, JJ., agreed. It will be at once perceived that in this case the acceptor was held as the principal and primary debtor on an accommodation bill, known to be such by the holder when he received it; and that act of the holder, which would have discharged a surety, was held not to affect his liability. We are not called upon, in this case, to approve or disapprove of the doctrine of that case, to the extent to which it was carried; but it is a decided authority for saying that an indorsee for value of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and that this right is unaffected by any subsequently acquired knowledge that the bill was given for accommodation. In such cases it is regarded as a mere truism to say that a release of the drawer, by the holder, has no effect on the ultimate liability of the acceptor.

The case of *Fentum v. Pocock*, 5 Taunt. 192, has been sustained and approved by the subsequent cases in England: *Price v. Edmunds*, 10 Barn. & Cress. 584; *Nichols v. Norris*, 3 Barn. & Adol. 41; *Harrison v. Courtauld*, Id. 36; *Rolfe v. Wyatt*, 5 Car. & P. 181; *Farquhar v. Southey*, 1 Moo. & M. 14; *Yallop v. Ebers*, 1 Barn. & Adol. 703. It is to be observed, also, that the same view of the subject is entertained by the different elementary authors: Chit. Bills, 344; Smith's Merc. L. 832; 3 Kent's Com. 104; Bailey on Bills, 364; Story on Prom. Notes, secs. 418, 423.

This subject has arisen before many of the courts in this country, and the rule is generally sustained "that the parties to a bill or note are bound by the character which they assume upon the face of the bill; if by that they are liable as primary debtors, or as principal, then, as to the holders, they are bound as such; and his knowledge, at the time when he takes the bill, that they or either of them are accommodation parties, will not vary the case:" *Montgomery Bank v. Walker*, 9 Serg. & R. 229 [11 Am. Dec. 709]; S. C., 12 Id. 382; *White v. Hopkins*, 3 Watts & S. 99 [37 Am. Dec. 542]; *Lewis v. Hanchman*, 2 Pa. St. 416; *Commercial Bank v. Cunningham*, 24 Pick. 275 [35 Am. Dec. 322]; *Church v. Barlow*, 9 Id. 551; *In re Babcock*, 3 Story, 398; *Lambert v. Sandford*, 1 Blackf. 137 [18 Am. Dec. 149]; *Clopper v. Union Bank*, 7 Har. & J. 92 [16 Am. Dec. 294].

In the case of *Claremont Bank v. Wood*, 10 Vt. 582, where several, some of whom were sureties, signed a note, "each as principals," and promised to pay, it was held that as to the holders they were to be regarded as principals, and not as sureties; and yet the primary liability of the acceptor, and the secondary liability of the drawer, is as expressly set forth on these bills as if it were written out in full over their respective signatures. In either case, to vary their respective liabilities, as they have assumed them on the face of the bills and note, would be to vary and control their intended operation, and, in effect, to enforce a contract which the parties never made.

On this subject it is important to observe a material distinction between joint and several promissory notes or obligations, and bills of exchange or notes, on which the parties have assumed only successive liabilities. In the former case, as between the makers and the holders, who at the time received the note with notice of the circumstances under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting its specific provisions, but as consistent with its terms; and the right of contribution, arising out of that relation, exists between them: 2 Am. Lead. Cas. 289, 303, in notes. But the drawer and acceptor and indorsers of a bill or note have not assumed a joint and several liability; neither are they strictly sureties; but are liable to each other, in the order of their becoming parties; and when the action is on the bill, or instrument, creating such successive liabilities, by an indorsee for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive lia-

bilities into a joint and several obligation, or placing them in the relation of principal and surety. The testimony clearly contradicts the express provision of the bill, and materially changes its legal effect. Unquestionably those liabilities may be charged, as between the parties, by an express contract to that effect, which may be enforced between them. But this in no way affects the rights of a holder, who, at least, became such in ignorance of that arrangement. Under such circumstances, the holder has only to look to the bill itself and the genuineness of the signatures, to ascertain the nature and extent of the liability of the parties thereon; and they are liable to him in the successive order in which their names appear upon the face of the bill: *McDonald v. Magruder*, 3 Pet. 471; *Flint v. Day*, 9 Vt. 345; *Brown v. Mott*, 7 Johns. 360.

This doctrine is sustained in Story's treatise on promissory notes, in which, sec. 418, he observes "that the strong tendency of the more recent authorities is to hold that in all cases the holder has a right to treat all the parties to a bill as liable to him exactly to the same extent and in the same manner, whether he knows or not the note to be an accommodation note; for as to him, all the parties agree to hold themselves primarily or secondarily liable, as they stand on the note; and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves." And in section 483 he further says: "Nor would it make any difference in the case, that the released party was, in point of fact, the party ultimately bound to pay the note, and that the other party was a mere accommodation maker, payee, or indorser, for his benefit; or at least, it would not make any difference, unless the fact of its being such accommodation note were, at the time of receiving the note, and not merely at the time of the release, known to the holder:" Story on Bills, secs. 291, 368, 432, 434. Chancellor Kent also observes "that the acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or a release. Accommodation paper is now governed by the same rules as other paper. This is the latest and the best doctrine both in England and this country:" 3 Kent's Com. 104.

As these bills were received and discounted by the plaintiffs before their maturity, without notice that they were for accommodation, we are satisfied, from the authorities, that they had a right to treat the acceptor as the principal debtor, and the drawer as liable only on his default. In such cases there is no

difference between accommodation bills and bills of value: in either case a release of the drawer from any further liability to the holder will have no effect as a discharge of the acceptor from his primary liability on the bill; and this right so to treat the parties on the bill remains unaffected by any notice subsequently given that the bill was for accommodation.

It is insisted, however, that the release of the drawer will in equity discharge the acceptor, and that the principles which prevail in that court are now equally available at law. From an examination of the cases in chancery, we entertain a decided conviction that the same principles on this subject prevail in equity as at law. If any diversity of opinion exists in that court on this question, it has arisen more from a misapprehension of the rule at law and a desire to conform to the principles there established than from any rules prevailing in equity at variance with them. There is much propriety in this; for the principles regulating bills of exchange have their origin in mercantile usage, and have been adopted to meet the exigencies and wants of commercial transactions; it is therefore equally the policy of courts of equity as of courts of law to make the application of and enforce those principles in relation to these securities which experience has found necessary to preserve their negotiability and credit.

In the case of *The Bank of Ireland v. Beresford*, 6 Dow, 233, Lord Eldon expressed his opinion of the case of *Fentum v. Pocock*, 5 Taunt. 192, and observed that "if it went on the principle that inquiry is not to be made into the knowledge of the party, but that all shall be taken as appearing on the face of the bill, I think it a most wholesome doctrine." The case is important only as showing the individual opinion of Lord Eldon on that question, and as showing that no different rule had then prevailed in chancery. In the case of *Ex parte Glendinning*, 1 Buck, 517, Lord Eldon refused to adopt the principle of the decision of *Fentum v. Pocock*, and recognized the general doctrine as held in *Laxton v. Peat*, 2 Camp. 185. That was the case of an accommodation acceptance, and known to be such by the holder when he received the bill. We are therefore not called upon to approve or disapprove of the doctrine of that case, for in this case the plaintiffs had no notice, when the bills were received and discounted, that they were for accommodation.

If the plaintiffs in this case had received the bills with knowledge that they were given for accommodation, we do not say but that the defense would be available; for when one takes a

bill, even before maturity, with notice of a given fact, it is not unreasonable that he should be charged with the consequences that result therefrom, as if the bill had been received overdue. But that principle does not apply when the bill is taken before maturity without notice and for value; for the bill is then held independent of all equities existing between the original parties; and Lord Eldon in that case nowhere intimates that the principle would have such an application. It is only to the case of an accommodation bill, and known to be such by the holder when he received the bill, that he made the application of that rule.

The case, however, which should and does exert a controlling influence in our decision of this case is that of *Harrison v. Court-auld*, 3 Barn. & Adol. 36. That case, it will be perceived, was sent from chancery, by the master of the rolls, for the opinion of the court of king's bench. This circumstance alone creates the inference that in relation to bills of exchange, on which the parties have assumed successive liabilities, the principles of equity are the same as at law, and that if the acceptor of these bills is not discharged at law, he would not be in equity; for it would be an idle proceeding for chancery to send a case to a court of law to ascertain the principles prevailing there, unless those principles have equal application in chancery. In that case, as we have assumed in this, the bill was accepted for the accommodation of the drawer, and was indorsed for value before its maturity. In that case, as in this, the holder was ignorant at the time he received the bill that it was given for accommodation, but was afterwards informed of that fact, before the act was done which the acceptor claimed operated as his discharge. It will at once be perceived how very similar are the two cases in every important particular. On the hearing of that case the decisions at law and in equity were considered; and all the judges, Chief Justice Tenterden, and Parks, Taunton, and Patterson, justices, certified to the court of chancery that the acceptor was liable on the bill the same as on a bill for value.

Whether, therefore, we apply to this case the principles prevailing in equity or at law, the result is the same. The plaintiffs having no notice, at the time they received the bills, that they were given for accommodation, had a right to treat the drawer as collaterally liable thereon, and the acceptor as the principal and primary debtor; and this right of the holder remains unaffected by any subsequent knowledge which he may have that they were for the accommodation of the drawer.

Under such circumstances, the release of the drawer in no way affects the liability of the defendant as acceptor. This view of the case renders it unnecessary to pass upon other questions which are urged in the argument of the case.

The result is, that the judgment of the county court must be reversed, and the case remanded.

ACCOMMODATION ACCEPTOR'S LIABILITIES: See *Abercrombie v. Knox*, 37 Am. Dec. 721; *Pitt v. Congdon*, 51 Id. 153; *Parks v. Ingram*, 55 Id. 153. In *Marsh v. Low*, 55 Ind. 273, the principal case is cited to the effect that one who accepts a bill, although for accommodation of the drawer, becomes a principal debtor, and not a surety for the drawer, and is bound by his acceptance whether he had funds in his hands of the drawer with which to pay the bill or not.

• ACCOMMODATION ACCEPTOR NOT DISCHARGED BY GIVING TIME TO DRAWER: *Lambert v. Sandford*, 18 Am. Dec. 149; but in *Parks v. Ingram*, 55 Id. 153, it is held that the discharge of an accommodation acceptor does not discharge the drawer.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

PARRILL v. MCKINLEY.

[9 GRATTAN, 1.]

PART PERFORMANCE OF ORAL CONTRACT TO EXCHANGE LANDS is sufficient to take it out of the statute of frauds and warrant specific enforcement where there has been delivery with acts of ownership on both sides.

DEED EXECUTED BY DEFENDANT IS SUFFICIENT MEMORANDUM under the statute of frauds, though not delivered, to support a decree for specific performance of a contract to exchange lands.

BILL FOR SPECIFIC PERFORMANCE MAY BE AMENDED TO ASK RESCISSION, together with other relief, in a suit on a contract to exchange lands, where it appears on the trial that the defendant can not make title.

BILL for the specific performance of a contract for the exchange of lands entered into between the complainant Parrill and the defendant William McKinley. The evidence at the hearing need not be stated, the effect of it, so far as material, sufficiently appearing from the opinion. The court below dismissed the bill with costs, and the complainant appealed.

Fry, for the appellant.

No counsel *contra*.

By Court, **ALLEN, J.** The court is of opinion that the contract of exchange in the bill mentioned is fully proved by the evidence in the record; and having been executed by the delivery of possession and acts of ownership by each party over the parcels of lands exchanged, there is proof of sufficient part performance to take the case out of the operation of the statute. And the court is further of opinion that the making of the deed and the signing and acknowledgment thereof by the appellee William

McKinley was a sufficient memorandum in writing according to the authority of *Bowles v. Woodson*, 6 Gratt. 78. The court is therefore of opinion that upon the proofs in the record the appellant would have been entitled to a decree for a specific execution of the contract of exchange set forth in the bill. But it furthermore appearing by the records and proceedings in suits of Hambleton and Denham, and of Keith and Camp, against the said McKinley and others, filed as exhibits, that all the lands of said William McKinley were bound by a judgment lien, prior in date to the time of said contract for exchange, and that a decree was rendered for the sale of his lands, and the same, or portions thereof, have been sold, the court upon the facts disclosed upon said exhibits should have directed an inquiry to ascertain whether any title to the Buffalo land in the bill mentioned could be made to the appellant, and if not, to have authorized him to amend his bill and seek for a rescission of the contract, and for such other and further relief as under the circumstances he might show himself entitled to.

Decree reversed with costs; and the cause remanded to be proceeded in according to the principles above declared.

PART PERFORMANCE TAKING PAROL AGREEMENT CONCERNING LANDS out of statute of frauds: See *Hoen v. Simmons*, 52 Am. Dec. 291; *Aday v. Echols*, Id. 225; *McMahan v. McMahan*, 53 Id. 481; *Christy v. Barnhart*, Id. 538, and note discussing this subject at length; *Hazelton v. Putnam*, 54 Id. 158; *Gangwer v. Fry*, 55 Id. 578.

MEMORANDUM OF CONTRACT FOR SALE OF LAND, SUFFICIENCY OF, under statute of frauds: See *Sherburne v. Shaw*, 8 Am. Dec. 47; *Cosack v. Descoudres*, 10 Id. 681; *Meadows v. Meadows*, 15 Id. 645; *Atwood v. Cobb*, 26 Id. 657; *Episcopal Church v. Wiley*, 30 Id. 386; *Smith v. Jones*, Id. 498; *Pipkin v. James*, 34 Id. 652; *Id. v. Stanton*, 40 Id. 698; *Hand v. Grant*, 43 Id. 528, and notes.

BILL IN EQUITY MAY BE AMENDED SO AS TO OBTAIN ENTIRELY DIFFERENT RELIEF from that originally asked for: *Belton v. Apperson*, 26 Gratt. 217, approving and following the principal case.

FURTHER HISTORY OF PRINCIPAL CASE will be found in *Parrill v. McKinley*, 6 W. Va. 67, where, upon an amended bill, as suggested in the opinion, Parrill obtained a final decree for specific performance, and the foregoing decision was approved.

TYREE v. WILSON.

[9 GRATTAN, 59.]

AUTHORITY OF DEPUTY SHERIFF CONTINUES AFTER EXPIRATION OF SHERIFF'S TERM with respect to all duties which may be performed by deputy, unless the authority is revoked or the sheriff dies.

SHERIFF AFTER EXPIRATION OF TERM HAS AUTHORITY TO SELL GOODS LEVIED upon during his term, and may be compelled to do so.

SHERIFF'S SURETIES FOR FIRST TERM ARE LIABLE FOR DEPUTY'S DEFAULT, AFTER EXPIRATION of a second term of the same sheriff, in collecting and not paying over money made on a *vend. ex.* issued on an execution levied by the deputy during such first term, where different sureties were given for the second term, and the same deputy again qualified, and was never removed, but continued to serve as deputy for such sheriff's successor, and as such returned the *vend. ex.* "satisfied."

NOTICE against the defendant as former high sheriff, and his sureties, to recover money collected by one William Tyree, a deputy, on an execution in the plaintiff's favor. Judgment for the plaintiff, and the defendants obtained a *supersedeas* from this court.

Price, for the appellants.

Caperton, for the appellee.

By Court, ALLEN, J. This was a proceeding by notice to recover from the sheriff of Fayette county and his sureties money collected by his deputy on an execution.

The sheriff gave bond and qualified on the seventeenth of March, 1840. On the eighth of September, 1840, a *fi. fa.*, made returnable on the first Monday of November following, was placed in the hands of William Tyree, who had qualified and was acting as deputy for the sheriff, and was returned by said deputy executed on personal property, and not sold for want of bidders.

The high sheriff qualified and gave bond, with different sureties, under a second commission, on the sixteenth of March, 1841. Tyree again qualified as deputy sheriff at the same term; and there was no order made thereafter displacing him; and at the end of the second year another person qualified as sheriff. On the twenty-fourth of March, 1848, the plaintiff caused a *venditioni exponas* to issue, which was directed to E. D. Vandal, late sheriff of Fayette county, which came to the hands of William Tyree, and was returned by him as deputy of said Vandal, "satisfied."

Upon this state of facts, it becomes necessary to determine whether, at the time of this last return, Tyree was the deputy of the high sheriff in this transaction, so as to bind his principal; and if he was, which set of sureties, those of the first or second year, would be responsible.

It being impossible for the high sheriff to attend personally to everything pertaining to his office, the law, from the neces-

sity of the case, allows him to make a deputy, and implicitly gives him power to execute all the ordinary offices of the sheriff, where the personal presence of the sheriff is not required by law: Bac. Abr., tit. Sheriff, letter H.

The full power to do any act or thing which his principal might have done is so essential that, according to Holt, C. J., giving the opinion of the court in *Parker v. Kell*, 1 Salk. 95, the power of the deputy can not be restrained to be less than that of his principal, save only that he can not make a deputy.

The authority of the deputy being thus unlimited as to extent, must also be equally indefinite as to duration, unless it be revoked. Accordingly, it was held, in *Jackson v. Collins*, 3 Cow. 89, that the authority of the deputy was limited by the duration of the authority of the principal, and did not cease when a new sheriff had taken the office.

In that case the deputy had sold land by virtue of an execution, and had given the purchaser a certificate that he would be entitled to a deed at the expiration of fifteen months; and he executed the deed about a year after the high sheriff went out of office. The court held that an execution against the property of the defendant, partly executed by the old sheriff, shall be completed by him, and that, *quoad hoc*, he is in office, and the acts of a deputy in relation to such an execution are the acts of the principal.

So in *Larned v. Allen*, 13 Mass. 295, warrants were placed in the hands of a deputy to collect. He collected a part before his principal went out of office; and having been appointed a deputy by the succeeding sheriff, collected the residue of the warrants after his last appointment. In an action against the sureties in a bond given by the deputy to the first sheriff, it was decided that as the warrants were put into his hands when he was deputy of the plaintiff, his power to complete the execution of them continued by virtue of the plaintiff's appointment; and the plaintiff had judgment. The same principle was affirmed in *Hill v. Fitzpatrick*, 6 Ala. 314; *The People v. Baker*, 20 Wend. 602.

In this court the principle has been recognized and acted upon in *Dabney v. Smith*, 5 Leigh, 13, and *Douglas v. Stump*, Id. 392. In these cases, administration having been committed to the sheriff, the administration had been conducted by the deputy after the sheriff's term expired; and it was held that the principal and his sureties were answerable for the deputy's administration after as well as before the term expired.

In the last case Tucker, president, said that the acts of the

deputy, after the expiration of the sheriff's term of office, are to be considered as the sheriff's official acts, unless he took the proper steps to remove the deputy. These authorities show that the appointment and authority of the deputy continue as long as the principal has any duty to perform as sheriff which may be performed by the deputy, unless the authority is revoked or the principal dies.

That the sheriff, after he is out of office, is authorized and may be compelled to sell the goods which he has levied on under an execution, is well settled. The same sheriff who begins an execution must end it: 2 Saund. 47 m, note 2. .

In England, according to the opinion of Holt, C. J., in *Clerk v. Withers*, 6 Mod. 299, a case twice elaborately argued, if a sheriff returns a levy and no sale for want of bidders, he may, if out of office, sell without a *venditioni exponas*. If he continue in office, he may be compelled to sell by a *venditioni exponas*; and if he be out of his office, a *distringas nuper vice comitam* goes to the new sheriff to distrain the old sheriff to sell. But these writs give him no new authority to sell, but are only intended to quicken him to do his duty, and also to give the parties interested the benefit of an official return, upon which, under our statutes, summary proceedings may be had. The writ of *distringas* is obsolete in Virginia, and is in fact rendered unnecessary by the twenty-third section of the act concerning executions: 1 Rev. Code, 533. That act provides that if the goods taken by the sheriff, or any part thereof, remain in his hands unsold, he shall make return thereof accordingly; and thereupon the clerk is required to issue a *venditioni exponas* to such sheriff directed. The directions of the act apply as well to a sheriff whose term of office has ceased, as to him whose office continues. In the case under consideration, the levy was made by the officer who qualified and gave bond on the seventeenth of March, 1840, as the execution was issued and levied before the expiration of the term of office for that year; and the sureties for that year were properly proceeded against upon the return of the deputy on the *venditioni exponas*.

Judgment should be affirmed with costs.

Judgment affirmed.

POWERS AND LIABILITIES OF SHERIFF AFTER EXPIRATION OF TERM: See the note to *Tukey v. Smith*, 36 Am. Dec. 705, where this subject is discussed. See also *Elkin v. People*, Id. 541; *Bondurant v. Buford*, 35 Id. 33; *Leshey v. Gardner*, 38 Id. 764; *McDonald v. Bradshaw*, 46 Id. 385, and notes thereto.

AUTHORITY OF DEPUTY SHERIFF AFTER SHERIFF'S TERM HAS EXPIRED:

See *Lofland v. Ewing*, 15 Am. Dec. 41, and note. The principal case is cited and approved on the point that the power of a deputy sheriff continues after the expiration of the sheriff's term of office as to the completion of all duties the execution of which was commenced during the term, in *Ballard v. Thomas* 19 Gratt. 24.

LIABILITY OF SHERIFF'S SURETIES FOR FAILURE TO PAY OVER MONEY COLLECTED AFTER EXPIRATION of the term for which they are sureties, on process received by him during such term: See the note to *Commonwealth v. Cole*, 46 Am. Dec. 511, 512. See also *McDonald v. Bradshaw*, Id. 385.

EMERICK v. TAVENER.

[9 GRATTAN, 220.]

PROOF OF TITLE IS GENERALLY UNNECESSARY WHERE PRIVITY OF ESTATE has existed between the parties to an action to recover realty.

TENANT IS ESTOPPED TO IMPUGN LANDLORD'S TITLE during the tenancy, or until he has restored possession, or done something equivalent thereto, either by proof of title in himself or another, whether the question arises in a direct action to recover possession or in a collateral action.

TENANT HOLDING OVER AFTER EXPIRATION OF LEASE IS ESTOPPED to deny his lessor's title. So a tenant acquiring possession by wrong.

ACCEPTANCE OF LEASE BY ONE IN POSSESSION ESTOPS him to dispute the lessor's title as effectually as if he had entered under it.

TENANT'S ESTOPPEL TO DENY LESSOR'S TITLE ATTACHES TO ALL SUCCESSORS who acquire possession through or under such tenant, either immediately or remotely. So where one acquires possession under an absolute conveyance in fee from the tenant.

TENANT ALIENATING PART OR ALL OF PREMISES REMAINS LIABLE to his lessor in an action to recover possession of the whole premises, if possession be withheld after termination of the tenancy, whether such alienation be by sublease or by conveyance in fee with warranty, and whether the action be ejectment or unlawful detainer.

LESSOR MAY RECOVER ENTIRE PREMISES DEMISED, and not merely the part actually occupied by the defendants, in an action for unlawful detainer against his tenant holding over after disclaimer, and against one in possession under such tenant, and may show by parol what was demised.

TENANT AND PURCHASER UNDER HIM MAY BE JOINED IN ACTION FOR UNLAWFUL DETAINER by the lessor, though they do not occupy the premises jointly, but each severally occupies a part.

LESSOR MAY INTRODUCE LEASE WITHOUT PROVING LOCALITY OR BOUNDARIES of the demised premises, in an action for unlawful detainer against his tenant holding over and disclaiming to hold under him.

PROOF IN ACTION FOR UNLAWFUL DETAINER OF DEFENDANT'S POSSESSION of some part of the premises is unnecessary against a tenant of the plaintiff holding over and disclaiming to hold under him, but *aliter* as to a purchaser under such tenant.

PURCHASER IN FEE UNDER TENANT IS NOT ENTITLED TO NOTICE TO QUIT before the lessor can maintain an action for unlawful detainer against him and the tenant jointly, where the tenant has received notice to quit or has made a formal disclaimer.

NOTICE TO QUIT IS UNNECESSARY WHERE FORMAL DISCLAIMER has been made by a tenant holding over, before bringing an action against him for unlawful detainer.

TENANT IS ESTOPPED TO DENY BOUNDARIES of the demised premises as described in the lease, or that his possession is within them, in an action for unlawful detainer, where he has executed the lease acknowledging such description and possession.

ERRONEOUS ADMISSION OF INTERROGATORY, WHICH IS WITHDRAWN afterwards without answer, is no ground of exception.

LEASE IS NOT VOID FOR UNCERTAINTY IN DESCRIPTION which describes the premises as a tract adjoining a certain farm, and formerly occupied by a certain person, containing a specified number of acres.

PLAINTIFF IN ACTION FOR UNLAWFUL DETAINER MAY RECOVER ACCORDING TO DESCRIPTION of the premises in his warrant or in the lease under which the defendant received possession from him, and must, at his peril, point out the premises to the sheriff, being compelled to make restitution if he takes more than he has recovered.

TENANT HOLDING OVER AFTER EXPIRATION OF LEASE IS TENANT FROM YEAR TO YEAR upon the conditions specified in the lease, if the lessor receives rent subsequently accruing, or otherwise indicates an intent to recognize him as such tenant; otherwise, he is merely a tenant at sufferance, not entitled to notice to quit.

TENANT'S POSSESSION DOES NOT BECOME ADVERSE by his holding over and disclaiming to hold under the lessor, and claiming the fee, unless full notice thereof is brought home to the lessor.

CONVEYANCE IN FEE BY TENANT IS NO DISSEISIN of the lessor, except at the latter's election.

TENANT CAN NO MORE DENY POSSESSION under which he enters to be his lessor's than he can controvert his title.

ACTION for unlawful detainer. Appeal by the defendants.
The opinion sufficiently states the case.

Fisher, for the appellants.

B. H. Smith, for the appellee.

By Court, **LEE, J.** This is a case of unlawful detainer from the county of Wood. The warrant was sued out on the eighteenth of January, 1848, by the defendant in error against the plaintiff, for the recovery of a tract of one hundred and sixty acres of land in that county. It was duly served upon the defendants therein named; and an appearance having been entered on the twenty-fourth of February, 1848, a jury was impaneled for the trial of the cause. During its progress sundry bills of exception were taken by the defendants in the action (*Emerick and Alton*) to the opinions and rulings of the court, and the jury having found a verdict in their favor, the plaintiff (*Tavener*) moved the court to set it aside and grant him a new trial, upon the ground that it was contrary to the evidence and to the in-

structions given by the court; and this being refused by the court, he excepted to the opinion of the court. Judgment having been rendered upon the verdict, Tavener then applied for and obtained a *supersedeas* from the circuit court of Wood county; and upon a hearing in that court, the court was of opinion that the judgment of the county court was erroneous: first, in giving the six instructions which it did give out of the nine asked for by defendants; and secondly, in overruling the motion for a new trial. The judgment was accordingly reversed, the verdict set aside, and a new trial granted upon the principles indicated in the opinion of the circuit court; and to this judgment from the circuit court the defendants have obtained a *supersedeas* from this court.

The questions presented by the record are numerous, though several of them resolve themselves into one, and they will be considered in the order in which they appear to have been raised upon the trial in the county court.

The first is that presented by the first instruction asked for by the defendants and given by the court. If this could be construed to mean merely that the jury must be satisfied from the evidence that the defendant Emerick was, at the time of the institution of the suit, in the possession of some part of the premises claimed, either actually and directly, or by legal intendment, it might be free from objection. But considered in connection with the evidence, it seems clear that it raises, and it may be presumed was intended to raise, the question (presented in several different forms upon the record) as to the effect of the deed from Emerick to Alton, and his transfer of the possession to him upon the relations in which Emerick stood to his landlord, Tavener; and it must be construed as an instruction to the jury, that if Alton held the actual possession of the land conveyed to him by Emerick at the institution of the suit, as to that Emerick was not responsible to the plaintiff in this action; and the correctness of this conclusion is thus presented for our consideration.

The doctrine is well settled that if a privity of estate have existed between parties to an action, proof of title is ordinarily unnecessary; for a party is not permitted to dispute the original title of him by whom he has been let into possession. A tenant can not be permitted to question or impugn the title of his landlord during the continuance of the tenancy, nor until he has restored the possession, or done what would be regarded as equivalent; nor can he be permitted to deny that the possession

so received was the possession of his landlord. And the rule is extended to the case of a tenant acquiring the possession by wrong against the owner, and to one holding over after the expiration of his lease; and it applies whether the question arises directly in an action brought against the tenant to recover the possession, or in a collateral form in some other action: *Wood v. Day*, 7 Taunt. 646; *Fleming v. Gooding*, 10 Bing. 549; *Taylor v. Needham*, 2 Taunt. 278; *Cooke v. Loxley*, 5 T. R. 4; *Codman v. Jenkins*, 14 Mass. 95; *Inhabitants of Watertown v. White*, 13 Mass. 477; *Galloway v. Ogle*, 2 Binn. 468; *Graham v. Moore*, 4 Serg. & R., 467; *Willison v. Watkins*, 3 Pet. 43; *Marley v. Rodgers*, 5 Yerg. 217; *Wilson v. Smith*, Id. 379; *Jackson v. Dobbin*, 3 Johns. 223; *Crabb on Real Property*, 327; *Archbold's Land. & Ten.* 219. Nor is the rule varied where the tenant is in actual possession of the premises at the time he accepts a lease: he thereby as effectually recognizes the title and possession of the lessor as if he had entered and taken possession under and by virtue of the lease itself: *McConnell v. Bowdry*, 4 T. B. Mon. 392. The same rule is recognized in equity: *Wilson v. Townshend*, 2 Ves. jun. 693; *Attorney General v. Hotham*, 3 Russ. 415.

When once this relation of landlord and tenant is established by the act of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely, the succeeding tenant being as much bound by the acts and admissions of his predecessor as if they were his own: *Doe v. Mills*, 2 Ad. & El. 17; *Doe v. Austin*, 2 Moo. & S. 107; *Doe v. Burton*, 9 Car. & P. 254; *Doe v. Smythe*, 4 Mau. & Sel. 347; *Jackson v. Scissam*, 3 Johns. 499. It has been suggested, however, that although a party succeeding a tenant in the possession is to be presumed to have taken as tenant also, yet that he may repel that presumption and escape being concluded by the acts and admissions of his predecessor, by showing that he did not take in that character, as by producing a deed from the tenant purporting (as in this case) to convey the premises in fee. But the contrary has been expressly decided; and it has been held that though the party purchase and enter upon the premises under an absolute conveyance, he still, in judgment of law, is deemed to have entered as the tenant of the landlord, and to hold the possession subject to all the duties and responsibilities appertaining to that character.

Anciently it was held that if the tenant alien the estate in fee by a mode of conveyance which had the effect of divesting the

estate of the reversioner, such as a feoffment, it was a forfeiture of the lease, and the lessor might enter. But this is now remedied in England by the statute 8 & 9 Vict., c. 106, sec. 4, which provides that a feoffment shall not have any tortious operation. But a conveyance under the statute of uses, such as the deed from Emerick to Alton, could not have the effect of a forfeiture, because it passed no greater interest than the tenant could lawfully convey, which was the *interesse termini* only; and this would not affect the rights and interests of the landlord: Bac. Abr., tit. Lease; Archbold's Land. & Ten. 94. Thus Alton acquired, by the conveyance from Emerick and his transfer of the possession, as against the lessor Tavener, no greater right than that by which Emerick held the possession. He took the premises in the same plight and condition in which they were held by him, and with all the duties and responsibilities, so far as Tavener was concerned, which could attach to Emerick himself. This doctrine, that a tenant can not be permitted, by any act of his during the tenancy, or until he surrenders the possession, to call in question his landlord's title, is as well sustained in reason and justice as it is supported by numerous authorities; and the good sense and sound reason on which it is founded are very forcibly illustrated by the judge delivering the opinion of the court in the case of *Wilson v. Smith*, 5 Yerg. 379.

It is very clear, therefore, that Alton, after his acceptance of the deed, and of the possession of the land from Emerick, stood in the same relation in respect of it to Tavener as Emerick himself, and upon Emerick's disclaimer he was liable to be sued without notice to quit, and be turned out of possession: Archbold's Land. & Ten. 87; *Jackson v. Wheeler*, 6 Johns. 272; *Jackson v. French*, 3 Wend. 339 [20 Am. Dec. 699]; *Willison v. Watkins*, 3 Pet. 43; Adams on Eject. 105. But it is supposed that even if he be so liable, yet that Emerick, having parted with title and possession, is so no longer. If this be so, then Emerick has certainly changed his relations to his lessor by his conveyance to Alton, and has greatly modified the duties and responsibilities which they had involved, as well as the rights which his lessor could previously have asserted. One of the clearest and most undeniable rights which Tavener acquired by the lease to Emerick was to receive peaceable possession of the premises upon the determination of the tenancy; and one of the plainest and most binding duties devolving upon Emerick was to surrender such possession. This is necessarily implied in every tenancy where not expressed; and in this case it was an express

stipulation in the agreement of lease executed by the parties. A lessor may rest in security under a lease of his property to a tenant of his own selection, regarding the possession of his tenant as his own possession, held under his title and ready to be surrendered upon the determination of the tenancy; or if not surrendered, having a responsible man bound for it and for all costs that he may be compelled to incur if his tenant shall, by his own refusal or by putting others in possession who shall withhold the premises, render legal proceedings necessary to regain it. As Sir James Mansfield said, in *Roe v. Wiggs*, 2 Bos. & P. N. R. 330, "the tenant ought to be subject to the costs [of the suit for possession] if it be not delivered up by the under-tenants; otherwise, a landlord would be in danger of having a pauper put into possession." Accordingly, we find that where a tenant lets a portion of the premises to an under-tenant, although on the determination of the tenancy he may have given a proper notice to his under-tenant, and may have surrendered up all that part of the premises remaining under his control, he is still liable to his lessor in ejectment for the part withheld by his under-tenant: *Adams on Eject.* 130.

The case of *Roe v. Wiggs*, 2 Bos. & P. N. R. 330, was an action of ejectment by a lessor against his tenant to recover possession of the leased premises upon the determination of the lease. The defendant had sublet a part of the premises, and when served with notice to quit, he surrendered all that part retained by him, but his under-tenants refused to quit the part underlet to them, and were in possession when the ejectment was served. It was objected in that case on the part of the defendant (the original tenant) that he was not, but the subtenants were, in possession at the time the ejectment was brought; and that, although he might be liable to an action of *assumpsit* for not delivering up possession, yet the default of others could not make him a wrong-doer in ejectment. The objection, however, was overruled, and there was a verdict for the plaintiff. A motion was made to set aside this verdict, upon the ground that the original tenant ought not to be held answerable in this form; but the court held that the lessor could not be thus turned over by his tenant to regain his possession by a suit against a person who might be utterly irresponsible for costs, and that notwithstanding the transfer of his interest and possession by the tenant, he was still responsible to his lessor for the possession in an action of ejectment. And the same principle is recognized in the case of *Pleasant ex dem. Hayton v. Benson*, 14 East, 234,

where it was held that notwithstanding a subletting by the tenant, the original tenancy as to the lessor continued in full force and undetermined. And as when the lessor is entitled to demand possession of the leased premises, and finds another in possession claiming under his tenant (whether as assignee, under-tenant, or purchaser is immaterial, as we have seen, and he need not inquire), he is clearly entitled to serve his ejectment upon him also, there could be no good reason why he might not unite him and his own tenant in the same action.

But it is supposed that if this be correct as to the action of ejectment, yet there may be a distinction between that action and the writ of unlawful detainer given by our statute; and it is suggested that the latter is a summary proceeding for the recovery of the very possession against the party actually holding it and claiming it unlawfully; and that such an unlawful detainer is a tort in the nature of a trespass committed (in the case in judgment) by Alton, for which Emerick, who had no control over him, should not be held responsible in a proceeding of this character. I do not perceive any good reason for a distinction upon this point between the action of ejectment and the writ of unlawful detainer. I regard the latter as the mere substitute for the former to recover possession in those cases in which the right to the possession only is in controversy, in which the plaintiff is required to show no title to sustain his action, and in which the possession of the defendant has not continued more than three years (the statutory limitation in this form of proceeding) against the consent of the plaintiff; and upon whatever right and proofs he could maintain in such a case, an action of ejectment against the defendants, he can, upon the same right and proofs, maintain this proceeding. As to the suggestion that the unlawful detainer is a tort in the nature of a trespass, for which the original tenant, having no control over the party actually holding the possession, ought not to be held responsible, it may be remarked that the foundation of the action of ejectment is a supposed trespass, and yet we have seen he is clearly liable in that action. It has been held that where a tenant disclaims to hold under his lease (as Emerick is proved to have done), he becomes thereby himself a trespasser; his possession then becomes a tortious one, and the lessor's right of entry is complete; and he may sue at any time within the period of limitation: *Willison v. Watkins*, 3 Pet. 43. But a party may unlawfully detain the possession from him having right, without being himself in the actual possession, but through the

agency and instrumentality of another who is. Here Emerick conveyed to Alton with certain covenants of warranty, and placed him in possession; and Alton is not at liberty to surrender the possession to Tavener. He is required by Emerick to retain the possession against Tavener and all the world until lawfully evicted, on pain, if he surrender it, of periling his remedy on the covenants of warranty in Emerick's deed. Thus Emerick may be said in a certain legal sense, for the purpose of this remedy, to cause and procure Alton to commit this supposed trespass by unlawfully detaining the possession from Tavener; and thus he himself becomes, according to the well-settled doctrine on that subject, a principal trespasser, and jointly liable as such with Alton, the immediate agent: 3 Stark. Ev. 1445, and authorities there cited.

In every view, therefore, I am of opinion that taking this instruction in connection with the evidence, it did not give a correct exposition of the law upon the subject to which it relates, and that the county court erred in giving it to the jury; and consequently that the circuit court did not err in directing that it should not be given upon a future trial.

The second instruction given on the motion of the defendant was, that under the lease given in evidence, in the absence of all other documentary testimony, the finding must be confined to the land in the actual occupancy of the defendants. This construction I think clearly erroneous. The plaintiff was not bound to show any title, and he had the right to show by parol testimony if he could what constituted the demised premises, which he was entitled to recover: *Crawford v. Morris*, 5 Gratt. 90. The instruction was also calculated to mislead the jury in the terms in which it was expressed; and on both grounds I think the circuit court properly directed it to be withheld from the jury on the future trial.

The third instruction the county court refused to give; and I will only here remark in regard to it, that I deem it clearly erroneous, and that the court was right in so refusing.

The fourth instruction was given, and it was to the effect that unless the jury should be satisfied the defendants were in the joint occupancy of the premises, enjoying the same jointly, they could not be joined in this proceeding, and they must find for the defendants. This presents the same question which I have considered upon the first instruction; and I have nothing to add to the reasons already assigned why both defendants might be properly joined. But the instruction is otherwise

erroneous in directing the jury to find for both defendants, even if they were not found in joint occupancy of the land; because if the party who was found to have no participation in the possession was entitled to a verdict in his favor, that was surely no reason why a verdict should pass also in favor of the other defendant who held the possession in severalty. I think the circuit court properly directed this instruction to be withheld upon the new trial.

Of the fifth instruction asked for by the defendants, the object was to withdraw and exclude from the jury the lease executed by Tavener and Emerick, unless the plaintiff should offer some evidence of locality and boundary. This instruction the county court refused, and as I think properly refused, to give.

The sixth instruction was, that unless the jury should be satisfied from the evidence that both the defendants were in actual possession of some part of the land claimed by the warrant at the time it issued, they should find for the defendant who was not proved to be in the actual possession or occupation of any part. If this instruction had been confined in its operation to the defendant Alton, it might have been free from objection; but as it is made to embrace the defendant Emerick also, and to place him and Alton on precisely the same ground, making the measure of his responsibility the same as that of Alton's, it is in my view, for the reasons assigned in considering the first instruction, improper and erroneous; and the circuit court did not err in directing that it should not be given on the new trial.

The seventh instruction was, that unless the jury were satisfied from the evidence that the defendant Alton had disclaimed the tenancy, or had had six months' notice to quit, they must find a verdict in his favor. There was no privity of contract between Tavener and Alton. Alton entered into possession, claiming under a conveyance purporting to be in fee from the tenant Emerick, and if he had held expressly as under-tenant of Emerick, it was neither necessary nor proper for the lessor Tavener to give him the half-year's notice to quit. Alton had done no act to acknowledge holding under Tavener, but on the contrary, entered upon the premises claiming to hold adversely in fee. All that it was necessary for Tavener to do to entitle him to recover possession from Emerick, his tenant, and *eodem flatu* from Alton, was to determine the tenancy by the half-year's notice to quit to Emerick; and that Emerick had rendered unnecessary by his formal disclaimer; as a tenant, by setting his landlord at defiance, or doing any act disclaiming to

hold of him as tenant, forfeits his right to any notice to quit, and may be proceeded against immediately. And where a party claims to hold land in fee, no notice to quit is ever necessary: *Adams on Eject.* 124; *Archbold's Land. & Ten.* 87; *Doe v. Long*, 9 Car. & P. 773; *Doe v. Grubb*, 10 Barn. & Cress. 816; *Jackson v. Deyo*, 3 Johns. 422; *Jackson v. Wheeler*, 6 Id. 272; *Willison v. Watkins*, 3 Pet. 43; *Pleasant v. Benson*, 14 East, 234; *Roe v. Wiggs*, 2 Bos. & P. N. R. 330. I think, therefore, there was no error in the refusal of the county court to give this instruction.

The eighth instruction was, that if the jury should be satisfied the deed from Emerick to Alton covered all the land which Emerick had in possession under the lease from Tavener, then the possession of said Emerick passed to said Alton at the date of the deed, and he had not at the institution of the suit such a possession as would subject him to this action, and that the jury must find in his favor. Without stopping to criticise the terms of the instruction according to which the mere execution of the deed by Emerick sufficed to put Alton in possession, although in fact he might still have retained the actual occupancy of the land, I will only remark that it raises exactly the same question of which I have already treated in considering the first instruction; and I have nothing further to add upon the subject. I am of opinion that the county court erred in giving this instruction, and that the circuit court was right in directing it to be withheld on the new trial.

The last instruction asked for on the part of the defendant was, that the jury must be satisfied the claim of the plaintiff had boundaries and that the defendants were within them; otherwise they must find for the defendants. The warrant was for the recovery of the precise tenement described in the lease, containing one hundred and sixty acres of land, and situated as therein described; and Emerick had, by executing the lease under his hand and seal, recognized the description and boundaries therein specified, and that he then held the same in possession and was within those boundaries. Neither he nor Alton, who claims under him, can now be entertained to deny that the tenement had its boundaries, as it would be in direct contravention of the rule which forbids a tenant from disputing the title of his landlord, or questioning the very possession which he acknowledges he had received from him. But if it were otherwise unobjectionable, the terms in which the instruction was expressed might by their vagueness and want of precision serve to mislead the

jury; and on both grounds I think the county court should have refused to give it.

The first bill of exceptions taken by the defendant was to the opinion of the court permitting a certain inquiry to be made of one of the witnesses. The inquiry was, however, afterwards withdrawn by the plaintiff, and nothing was said by that witness or any other in response to it. I dismiss it therefore without further notice.

The second bill of exceptions taken by the defendant was to the exclusion of the documentary testimony offered by him to be read to the jury. It consisted of a grant from the commonwealth to one Israel Lacy for thirty thousand acres, embracing the land in controversy, which issued on the twentieth of January, 1797, with a certificate from the auditor showing that it had been forfeited to the commonwealth for non-payment of taxes; also an entry made by Emerick of one hundred acres of land, and a survey made for him of one hundred and seventeen acres of land, lying partly upon the one hundred and sixty acres claimed by the plaintiff, and a grant to him for the same from the commonwealth, dated the twenty-ninth of February, 1844; also an entry made by one Josiah D. Wilson and one Jacob Cork of sixty-five acres, lying wholly upon the one hundred and sixty acres claimed by the plaintiff, and a grant to said Wilson and Cork for the same, dated the tenth of May, 1844; also the commissioner's books of Wood county, showing that the lands so patented to Emerick, and Wilson and Cork, had been duly entered thereon for taxation, and the receipts for the taxes properly chargeable thereon. The plain object and purpose with which the defendants sought to give this evidence to the jury was to impugn and call in question the title of Tavener to the land. This I have already shown they could not be permitted to do in this action; and the county court rightfully refused to permit the evidence offered to be given to the jury.

The defendants then offered to give in evidence such of the papers before recited as in their opinion tended to prove that they had not possession of the land claimed by the plaintiff, or any part thereof; but the county court refused to permit any of the said papers to be read to the jury; and this refusal constituted the subject of the defendants' third bill of exceptions. Had the county court done otherwise, it would have completely nullified the decision which they had just made, because the defendants might have thought all of these papers tended to

prove that they had not the possession of the premises. I do not perceive how any of those documents could tend to throw light upon the question whether Emerick and Alton had the actual possession of the premises at the date of the warrant or not, and I consider it as wholly irrelevant to that inquiry. To admit any of these documents would have effectually enabled the defendants to escape the operation and effect of the rule denying to them the right to impugn the title of the lessor. I think the county court was right in refusing to permit any of those documents to be given in evidence to the jury.

The defendants' fourth bill of exceptions was to the opinion of the court refusing three of the nine instructions which they had asked for, and which are set out also in the plaintiff's first bill of exceptions. With regard to the first and second of these instructions, which are, in substance and effect, the same as the third and fifth instructions set out in the plaintiff's first bill of exceptions, I will truly remark that I can perceive no ground upon which the lease from Tavener to Emerick should have been held void for uncertainty, or excluded from the jury, unless accompanied by evidence of the locality or boundaries of the land. The lease was of a tract of land "adjoining David Kinnaid," and formerly occupied by Henry Dye, containing one hundred and sixty acres, and of which the said Emerick thereby admitted, under his hand and seal, that he was then in possession. The description thus given of the premises was much more precise than that required to be given in the complaint and warrant by the statute, and it was not for Emerick, I apprehend, to object that there was no proof of the boundary of the tenement, the locality of which he had distinctly recognized, and of which he acknowledged he held possession. The plaintiff, if otherwise entitled, may recover according to the description in his warrant or that in the lease, or such part as the verdict may find, and he must then point out to the sheriff the premises of which he is to give him possession, at his peril; and if he take more than he has recovered in the action, the court will interfere in a summary manner, and compel him to make restitution: *Adams on Eject.* 341; *Jackson v. Rathbone*, 3 Cow. 291; *Camden v. Haskill*, 3 Rand. 462.

The third of these instructions corresponds to the seventh of the series set out in the plaintiff's first bill of exceptions, and for the reasons then stated, I think the court was right in refusing to give it.

The defendants' fifth bill of exceptions was to the opinion of

the court overruling their objections to the five several instructions asked for on the part of the plaintiff, and giving the same to the jury. The first of these instructions was, that if the jury believed Emerick entered into possession under the lease, but continued on the premises after the expiration of the term, he thereby became a tenant from year to year, according to the terms of the lease. The doctrine appears to be well settled, that where a tenant holds over after the expiration of his lease, and the lessor receives rent accruing subsequently to the expiration of the term, or does any act from which it may be inferred that he intends to recognize him still as such tenant, he becomes thereby tenant from year to year, upon the conditions of the original lease. Where, however, the lessor does no act recognizing a continued tenancy, the tenant holding over is but a tenant at sufferance, and not entitled to notice to quit: *Adams on Eject.* 110; *Harding v. Crethorn*, 1 Esp. 57; *Doe v. Stennett*, 2 Id. 716; *Bishop v. Howard*, 2 Barn. & Cress. 100; *Digby v. Atkinson*, 4 Camp. 275; *Hutton v. Warren*, 1 Mee. & W. 466; *Jackson ex dem. Wood v. Salmon*, 4 Wend. 327; *Jackson v. McLeod*, 12 Johns. 182; *Wilde v. Cantillon*, 1 Johns. Cas. 124; *Jackson v. Raymond*, Id. 85, in note. In this case the tenancy created by the original lease terminated on the first of April, 1840, and Emerick's being suffered to continue in the possession for upwards of seven years afterwards might be regarded as a sufficient recognition of the tenancy on the part of Tavener to create a tenancy from year to year. Certainly the defendants can not complain that Emerick's holding after the expiration of the original tenancy was placed on the more beneficial footing of a tenancy from year to year rather than that of a tenancy by sufferance. I think the court committed no error in giving this instruction to the jury.

The second instruction moved for by the plaintiff embraced the substance of the first, excepting that the relation between Tavener and Emerick, after the expiration of the original term, was described as a tenancy generally, without calling it a tenancy for years, and with this addition, that this tenancy continued as long as Emerick remained thereon, unless it appeared that he had disclaimed such tenancy and asserted a right adverse to the plaintiff; and that in such case, unless such disclaimer and assertion of adverse right were brought home to the knowledge of the plaintiff more than three years before the institution of the suit, he was entitled to recover against Emerick. It is clear that possession of land by the consent of the true owner does not

constitute adversary possession, and the possession of a tenant is the possession of his landlord; and his continuing in possession after the expiration of his term, as we have seen, creates an implied tenancy and is no disseisin of the landlord: *Atherton v. Johnson*, 2 N. H. 31; *Jackson v. Raymond*, 1 Johns. Cas. 85, *in notis*. Nor is his conveyance a fee in disseisin, unless at the election of the landlord: *Jackson v. Davis*, 5 Cow. 123 [15 Am. Dec. 451]. It is true it has been held that a tenant may, by disclaimer, or by claiming the fee adversely in his own right, or that of another, convert the possession held under his landlord into a tortious and adversary possession: *Willison v. Watkins*, 3 Pet. 43. But I apprehend if this doctrine is to be sustained, he must at least give his landlord, who is reposing under the security of the tenancy, believing his tenant's possession his own possession, full notice of such disclaimer or assertion of adverse title. It was said by the judge delivering the opinion of the court in the case of *Wilson ads. Weathersby*, 1 Nott & M. 373, that there must be a surrender of the possession to the landlord, or a distinct and *bona fide* abandonment of it at least, to put the tenant in a condition to dispute the lessor's title. He can not be permitted to do so while he remains in possession. He has a right to purchase any title he pleases, but he is bound *bona fide* to give up possession and to bring his action, and recover by the strength of his own title. The relation between landlord and tenant is said to be in this respect similar to that between tenants in common: *Willison v. Watkins*, *supra*; and it has been held with regard to the latter, that a silent possession by one tenant in common, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, should not be construed into an adverse possession: Marshall, C. J., delivering the opinion of the court in *McClung v. Ross*, 5 Wheat. 116, 124; *Purcell v. Wilson*, 4 Gratt. 16. Still less, it seems to me, would such a possession by a party coming in as a tenant, after the expiration of his term, amount to an adversary possession. I think the court did not err in giving this instruction to the jury.

The third instruction asked for by the plaintiff embraced the substance of the second, and further sought an expression of opinion on the part of the court, that the defendant Alton, by entering on part of the land as purchaser from Emerick, thereby became subject to the same relations held by Emerick towards his lessor Tavener, and neither could set up an adverse title without showing that they had returned the possession; and

that unless such possession had been restored to the plaintiff, or held adversely by the defendants for more than three years before the institution of this suit, the jury should find for the plaintiff. This instruction is entirely in unison with the views I have already expressed, and I think it unnecessary to add anything further to them. I will only remark that the instruction seems to be fully and directly sustained upon that branch relating to the plaintiff's right to recover, by the opinion of the court in the case of *Willison v. Watkins*, 3 Pet. 43. I think the county court committed no error in giving this instruction to the jury.

The fourth instruction embraced nothing more than did the second and third instructions, excepting perhaps the intimation to the jury, that if the tenancy claimed by Tavenor to exist were established to their satisfaction, one of its legal consequences was, that the defendants could no more deny that the possession under which Emerick entered was the possession of his lessor than he could controvert his title. This proposition was but a corollary from those already asserted, and entirely free from objection, for the reasons I have already endeavored to assign.

The last instruction asked for on the part of the plaintiff raises the same question which I have already fully considered in expressing my views upon the first instruction asked for on the part of the defendants, and to them I have nothing further to add. I think the county court was right in giving this instruction.

The last question in the cause is that arising upon the plaintiff's bill of exceptions to the opinion of the county court overruling his motion for a new trial, on the ground that the verdict was contrary to the evidence and the instructions of the court. The circuit court reversed the judgment of the county court, upon the ground that that court erred in giving the instructions asked for by the defendants, and also erred in not granting the plaintiff a new trial, on the ground that the verdict was contrary to the evidence. The plaintiff proved that he had let the premises to Emerick for one year, commencing on the first day of January, 1839, by a lease in writing, and signed and sealed by both parties, containing stipulations for the payment of rent, against waste, and for the peaceable surrender of the premises at the end of the term; the lease also recited that Emerick was in possession of the land at its date. He further proved that he had claimed the land as his for a number of years previously, and had made a verbal contract for the sale thereof to one Dye,

about the year 1834, under which the said Dye took possession of it, built a cabin upon it, into which he moved his family, and lived upon the land some two or three years, during which time he cleared a small portion of it, and afterwards rented it for a year or two to subtenants; that without completing his purchase, and learning from Emerick that he had leased the land of the plaintiff, he, Dye, abandoned the possession. The plaintiff further proved that on the fourteenth of April, 1847, Emerick sold and conveyed by deed, with certain covenants of warranty, a tract of land containing forty-six and three fourths acres, by metes and bounds, lying in Wood county, on Stillwell's creek, together with another tract adjoining the foregoing, containing thirty-nine acres, also described by metes and bounds; covenanting to repay the purchase money and interest for the first-described tract if his title thereto should be superseded by a better within two years from the first of April, 1846, and to warrant generally the title to the other tract. He further proved that Emerick owned and lived on the David Kinnaird farm, which adjoined the land in controversy, and had occupied the improvement made by Dye on said land by cultivating the same until within about two years, when he put the defendant Alton thereon under the deed aforesaid; and he further proved that about the middle of November, 1847, he produced the lease aforesaid, and demanded rent of Emerick for the premises; that Emerick acknowledged the lease to be his, but refused to pay rent; and that he, plaintiff, then demanded possession of the leased premises, and that Emerick refused to surrender the same, denied the plaintiff's title, and said he would neither pay rent nor surrender possession. The plaintiff here closed, and the defendants gave no testimony whatever tending to impair the plaintiff's right to recover upon the case so made. And upon this case I think it clear the plaintiff was entitled to recover, though as to the extent of his recovery, and whether on this joint action against Emerick and Alton it must not be confined to that portion of the land of which Alton was placed in possession under his deed, I do not mean to be understood as expressing any opinion; the question not now arising in the case. I think, therefore, the county court erred in not setting aside the verdict and granting the plaintiff a new trial.

And upon the whole case, I am of opinion that there is no error in the judgment of the circuit court, and that the same should be affirmed with costs.

The other judges concurred in the opinion of LEE, J.

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE: See *Niles v. Ranford*, 51 Am. Dec. 95; *Den d. Murrell v. Roberts*, 53 Id. 419; *Givens v. Mullinax*, 55 Id. 706; *James v. Patterson*, Id. 737, and cases cited in the notes thereto. The foregoing decision is cited as authority for the general proposition that one can not dispute the title under which he receives possession in a contest with the person from whom he receives it, in *McClung v. Echols*, 5 W. Va. 215.

ESTOPPEL ARISING FROM ACCEPTANCE OF LEASE BY ONE IN POSSESSION: See *Camp v. Camp*, 13 Am. Dec. 60, and the note thereto, discussing this subject. See also *Hall v. Benner*, 21 Id. 394, and note; and as to an estoppel from acknowledging another's title by one in possession of land, see *Givens v. Mullinax*, 55 Id. 706. In *Turpin v. Sawyers*, 32 Gratt. 32; S. C., 3 Va. L. J. 731, the principal case is cited to the point that a party in possession accepting a lease from another is estopped to deny the latter's title, but the doctrine is said to be questionable.

ESTOPPEL OF ONE COMING IN UNDER TENANT TO IMPUGN LESSOR'S TITLE: See *Stewart v. Roderick*, 39 Am. Dec. 71; *Dikeman v. Parrish*, 47 Id. 455; *Bank of Utica v. Mersereau*, 49 Id. 231, note. The principal case is cited to this point in *Gale v. Oil etc. Co.*, 6 W. Va. 210. So in *McFarland v. Douglass*, 11 Id. 652, it is cited to the point that collusion between a tenant and a stranger to defeat the lessor's rights will not be allowed.

NOTICE TO QUIT, WHEN NECESSARY, AND WHO ENTITLED TO: See *Stedman v. McIntosh*, 42 Am. Dec. 122, and note thereto, discussing this subject at considerable length. See also *Glascock v. Robards*, 55 Id. 108; *Kilburn v. Ritchie*, 56 Id. 326, and notes; *Seabury v. Stewart*, *post*, p. 254, and note.

TENANT HOLDING OVER, RIGHTS OF, AND NATURE OF TENANCY: See *De Young v. Buchanan*, 32 Am. Dec. 156; *Whaley v. Whaley*, 40 Id. 594, and notes.

ADVERSE POSSESSION BY TENANT AGAINST LESSOR, WHAT CONSTITUTES: See *Crane v. Marshall*, 33 Am. Dec. 631; *Whaley v. Whaley*, 40 Id. 594; *Farrow v. Edmundson*, 41 Id. 250; *Rigg v. Cook*, 46 Id. 462, and notes.

DISCLAIMER BY TENANT, EFFECT OF: See *Duke v. Harper*, 27 Am. Dec. 462; *Tillotson v. Kennedy*, 39 Id. 330; *Whaley v. Whaley*, 40 Id. 594; *Farrow v. Edmundson*, 41 Id. 250. After a disclaimer the lessor may bring an action for unlawful detainer without a previous demand of possession: *Rabe v. Fyler*, 48 Id. 763. In *Miller v. Williams*, 15 Gratt. 218, the principal case is cited with approval to the point that after disclaimer by a tenant and an assertion of an adverse holding the lessor may recover without proving a legal title. The case is distinguished in *Gale v. Oil etc. Co.*, 6 W. Va. 210, as not deciding the question whether an unexpired lease will be forfeited by mere words of disclaimer.

CONVEYANCE IN FEE BY TENANT IS NO DISSEISIN of the lessor except at the latter's election: *Jackson v. Davis*, 15 Am. Dec. 451.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

BEN v. STATE.

[22 ALABAMA, 9.]

INDICTMENT CHARGING TWO OR MORE CRIMES IN ONE COUNT is bad for duplicity.

INDICTMENT CHARGING ADMINISTERING POISON AND CAUSING IT TO BE ADMINISTERED TO THREE PERSONS, in the same count, is not bad for duplicity.

INDICTMENT CHARGING STATUTORY OFFENSE NOT IN STATUTORY WORDS BUT EQUIVALENT WORDS is good.

INDICTMENT FOR "ATTEMPT TO POISON," UNDER STATUTE CHARGING ADMINISTERING POISON to persons named, willfully and maliciously, and with intent to kill and murder, is good, though not adopting the words of the statute.

THAT RECORD DOES NOT SHOW PRISONER WAS FURNISHED WITH COPY OF INDICTMENT and a list of the jury before trial, as required, is not available on error, if no objection appears to have made at the trial.

ERROR to reverse a judgment of death upon an indictment for an attempt to poison. The case appears from the opinion.

Bliss and Hale, for the plaintiff in error.

M. A. Baldwin, attorney general, contra.

By Court, CHILTON, C. J. 1. It is contended by the counsel for the prisoner that the indictment in this case is bad, because it charges the commission of several offenses in one count—as, 1. That the prisoner administered the poison to the persons named; 2. That he caused the same to be administered; and 3. That he administered and caused it to be administered to three individuals. We have examined these objections to the indictment with much care, and are constrained to hold that they are not

well taken. It is certainly true that an indictment must not be double; that is, the defendant must not be charged with having committed two or more offenses in any one count. For example, it is not permissible to charge a defendant in the same count with having committed murder and robbery: Archb. Cr. Pl. 50. Mr. Archbold says the only exceptions to this rule are to be found in indictments for burglary, in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended; and in indictments for embezzlement by clerks and servants, which under the English statute 7 & 8 Geo. IV., c. 29, sec. 8, may charge any number of distinct acts not exceeding three. But he says that laying several overt acts in a count for high treason is not duplicity, citing Kel. 8; nor is a count that the defendant published and caused to be published a libel liable to this objection, since he says they are the same offense; so of a count charging one endeavor to commit two offenses, because the endeavor is the gist of the offense; and he further adds, that "it is now generally understood that a man may be indicted for the battery of two or more persons in the same count, or for a libel on two more persons where the publication is the same act:" Id. 50; *Rex v. Benfield*, 2 Burr. 980, overruling *Rex v. Clendon*, as reported in 2 Stra. 870; S. C., 2 Ld. Raym. 1572.

Several decisions in this court go very clearly to sustain the sufficiency of the count in this case. In *The State v. Murphy*, 6 Ala. 846 [41 Am. Dec. 79], it was held, that although the language of the statute was in the disjunctive, against any one who should "buy, receive, conceal, or aid in the concealment of stolen goods," yet that a count was not bad for duplicity which charged the prisoner with receiving and concealing stolen goods.

In *Mooney v. State*, 8 Ala. 328, the defendant, with two others, was charged in the same count, for that, on a certain day, they "did unlawfully and feloniously inveigle, steal, carry, and entice away two negro slaves," etc.; and upon a demurrer this court said: "These are all offenses of the same grade, although there may be a slight distinction between the two classes of 'stealing and carrying away,' and inveigling and enticing;" and it was there held that, "whether they were distinct offenses or not, inasmuch as the same penalty was provided for each, they might be included in the same count in the indictment." We do not understand the court as holding that substantive and entirely distinct offenses may be thus united, because the pun-

ishment is the same, but that when "different grades of the same offense," and which are punished by the same penalty, are embraced in one count, it is sufficient, and the state is entitled to the conviction of the accused upon proving either. The example of an indictment for forgery is a forcible illustration of the rule, in which, according to Mr. Chitty's forms, 3 Chit. Cr. L. 1066, it is usual to aver that the prisoner "feloniously did falsely make, forge, and counterfeit, and feloniously did falsely procure to be made, forged, and counterfeited, and feloniously did willingly act and assist in the false making, forging, and counterfeiting, a certain bond," etc.: *Mooney v. State, supra*, and cases cited in that opinion. These cases, we think, are sufficient to show that the indictment before us is not liable to the objection of duplicity. The offense consists in the attempt to destroy life, by administering to a white person any deadly poison; and that by this effort he compasses the lives of three instead of one, or that he places the poison in such a situation as to cause them to take it with the intent thereby of depriving them of life, and does not hand it to them himself, does not change the nature of the offense, except in so far as they may be considered circumstances of aggravation; nor do they in any wise affect the penalty.

2. But it is objected, in the second place, that this is not for an attempt to poison, but for the actual administering of poison, and causing it to be administered to several persons. It is not denied "that the attempt to poison" is fully comprehended in the charge contained in the indictment, and that all the constituent elements of the offense, as the same is denounced by the statute, must necessarily be proved in order to sustain the charge. The objection is, that the language of the statute has not been pursued; that equivalent expressions will not suffice, and that if such were the law, it is maintained by the counsel that the charge in this indictment does not make out the statutory offense.

The statute declares that any slave who shall attempt to poison or to deprive any white person of life by any means not amounting to an assault, and be thereof convicted, shall suffer death: Clay's Dig. 472, sec. 4.

The charge is, that the prisoner "feloniously, willfully, and of his malice aforethought did administer to and cause to be administered to and taken by one George McKinney, Margaret A. McKinney, and one Nancy Herndon, then and there being free white persons, a large quantity of arsenic, to wit, one half

ounce thereof, which said arsenic, so administered and caused to be administered, was then and there a deadly poison, calculated in its effects to destroy human life, with intent, then and there, feloniously, willfully, and of his malice aforethought to kill and murder," etc., the persons named. It is too plain to admit of argument, that the willful and malicious infection of the system with a deadly poison, with the intent to destroy life, is an attempt to poison within the meaning of the statute; and unless the rule is so stringent as to require the offense to be charged in the exact words of the statute, the indictment is unquestionably good. And here we need only to refer to the case of *The State v. Bullock*, 13 Ala. 413, to show that the indictment need not contain the exact words used in the statute, but that it is sufficient if the words used as descriptive of the offense be equivalent to those employed in the statute. We entertain no doubt of the correctness of this proposition. It is laid down in the works upon the criminal law, "that where a word not in the statute is substituted for one that is, and the word thus substituted is equivalent to that employed in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient:" See Archb. Cr. Pl. 47, and authorities cited by him. Indeed, it often happens that an indictment charging an offense in the language of the statute is wholly insufficient; as if a statute uses a generic term, it is said to be necessary to state the species: *Rex v. Fuller*, 1 Bos. & Pul. 180; Archb. Cr. Pl. 48. So if the statute does not define the offense, or point out its constituents, the indictment should aver such facts and circumstances as will constitute the offense within the meaning of the legislature. It must be made judicially to appear to the court that the indictor has proceeded upon sufficient premises: *Beasley v. The State*, 18 Ala. 535. In the case of *The State v. Clarissa*, 11 Id. 57, this court was called upon to construe the statute now under consideration, and to determine upon the sufficiency of an indictment which appears to be the counterpart of this, except that it failed to charge that the drug (the seed of Jamestown weed) was poisonous and calculated in its effects to destroy human life; and for this defect the indictment was held bad. This necessary averment is contained in the indictment before us, which appears in all respects to conform to the ruling of the court as contained in the opinion last cited.

3. Having determined that the offense denounced by the statute is sufficiently described in the indictment, it follows that the third and fourth objections, namely, that the circuit court

had no jurisdiction of the offense, and therefore erred in pronouncing the sentence prescribed by the statute, can not be supported. It only remains to consider the fifth and last ground of objection to the regularity of the conviction, which is, that the record fails to show that the prisoner was served with a copy of the indictment and list of the jury two entire days before his trial, or that the *venire* was returned into court. The case of *The State v. McLendon*, 1 Stew. 195, is cited to support this objection; but it will be observed that the counsel for the prisoner in that case, when the prisoner was brought before the bar for trial, objected that the list of the jury had not been furnished either to the prisoner or his counsel two entire days before, etc.; and this was shown affirmatively by the record to be true. The court very properly held that it was erroneous to exclude him from this benefit, and reversed the conviction. In the case before us, however, no such objection was raised in the primary court; nor is there anything apparent upon the record from which it may be inferred that the prisoner had not the benefit of the list of jurors and copy of the indictment, or that the jury was not returned into court as required by its order. The prisoner appears to have been regularly arraigned, and pleaded not guilty; and after being allowed to withdraw his plea for the purpose of demurring, he again puts it upon record, and goes to trial without any objection. The law will not intend that he was put upon trial without a regular jury, against the entry which recites that twelve good and lawful men composed the jury, nor that the court denied him any right to which by law he was entitled. The circuit court is one of general plenary jurisdiction, and intendments against the regularity of its proceedings are not to be indulged. Similar objections were taken in the case of *The State v. Williams*, 3 Stew. 454, 462, 463, and were overruled.

After a patient examination of the case, we are fully satisfied that there is no error in the record, and the judgment must consequently be affirmed.

As the sentence of execution of the prisoner was postponed by order of one of the judges in vacation, under the provisions of the statute it is necessary that another day be fixed. The day for his execution will accordingly be designated in the entry of affirmance.

CHARGING TWO OR MORE OFFENSES IN SAME INDICTMENT.—The question as to when and how far it is proper to charge more than one offense in the same indictment, and the kindred question as to when an indictment may be

regarded as charging more than a single offense, have given rise to considerable discussion and to some rather obscure distinctions. We propose to consider the subject under two heads: 1. Charging distinct offenses in the same count of an indictment; 2. Joinder of counts for different offenses in the same indictment. Our attention will, however, be principally devoted to the first point.

CHARGING DISTINCT OFFENSES IN SAME COUNT OF INDICTMENT is a vice in pleading denominated "duplicity," which is said to consist in "multiplicity of distinct matter to one and the same thing whereunto several answers are required: 1 Bouv. Law Dict., tit. Duplicity; or "in alleging for one single purpose or object two or more distinct grounds of complaint or defense, when one of them would be as effectual in law as both or all:" Gould Pl., c. 8, sec. 1; 1 Bish. Crim. Proc., 3d ed., sec. 432. One of the great objects of all pleading, civil and criminal, is to reduce the altercations of the parties to a single and certain issue. While this is the general rule in both civil and criminal cases, it is, if possible, more stringently applied in the latter than in the former. In order that an accused person may not be embarrassed or confused in his defense, it is an imperative requirement in criminal procedure that the charge in the indictment shall be specific and definite, and that if several matters are alleged against the prisoner, each shall be stated in a separate count, each count being single and certain. Hence:

1. *General Rule is that Count Charging Distinct Offenses is Bad* for duplicity, and if objected to in apt time, the court will grant relief against it: Whart. Crim. Pl. & Pr., sec. 243; 1 Bish. Crim. Proc., 3d ed., sec. 432; *McGahagin v. State*, 17 Fla. 665; *State v. Shields*, 8 Blackf. 151; *Knopf v. State*, 84 Ind. 316; S. C., 17 West. Jur. 33; *State v. Weil*, 89 Ind. 286; *State v. McPherson*, 9 Iowa, 53; *State v. Stouderman*, 6 La. Ann. 286; *State v. Taylor*, 17 Rep. 788 (La.); *State v. Palmer*, 35 Me. 9; *Commonwealth v. Symonds*, 2 Mass. 163; *State v. Nelson*, 8 N. H. 163; *Morse v. Eaton*, 23 Id. 415; *State v. Fowler*, 28 Id. 184; *People v. Wright*, 9 Wend. 193; *Reed v. People*, 1 Park. Cr. 481; *Hutchison v. Commonwealth*, 82 Pa. St. 472; *Commonwealth v. Bartilson*, 85 Pa. St. 487; *Fulmer v. Commonwealth*, 97 Id. 503; S. C., 10 Week. Notes Cas. 437; *Commonwealth v. Schaub*, 16 Chic. L. N. 204 (Pa.); *Greenlow v. State*, 4 Humph. 25; *Davis v. State*, 3 Coldw. 77; *Womack v. State*, 7 Id. 508; *Weathersby v. State*, 1 Tex. App. 643; *United States v. Sharp*, Pet. C. Ct. 131. The rule is sometimes stated to be that offenses created by different statutes, or to which different penalties are annexed, can not be included in the same count: *McGahagin v. State*, 17 Fla. 665; *Knopf v. State*, 84 Ind. 316; S. C., 17 West. Jur. 33; *State v. Stouderman*, 6 La. Ann. 286; *State v. Taylor*, 17 Rep. 788 (La.); *Commonwealth v. Symonds*, 2 Mass. 163; *People v. Wright*, 9 Wend. 193; *Reed v. People*, 1 Park. Cr. 481; *Hutchison v. Commonwealth*, 82 Pa. St. 472; *Commonwealth v. Schaub*, 16 Chic. L. N. 204 (Pa.); *Greenlow v. State*, 4 Humph. 25. This is no doubt true, but we apprehend that the true reason is, not because the offenses arise under different statutes, or are differently punished, but because they are, in reality, distinct offenses, and that where offenses apparently distinct, but arising under the same statute, and having the same punishments, are permitted to be embraced in the same count, it is because, in the circumstances of the case, they constitute, in effect, but one offense. As the undoubted purpose of the rule against duplicity in indictments is to enable the prisoner to answer to but one charge at a time, if he is called upon to defend against two really distinct accusations in the same count the rule is violated, whether the

alleged offenses are created by the same statute and are obnoxious to the same penalties or not. Hence, the implied limitation of the doctrine in the cases last cited is somewhat misleading.

Illustrations of the rule forbidding joinder of distinct offenses in the same count of an indictment are abundant, but only a few need be mentioned. Where a capital felony and a misdemeanor are joined in the same count the indictment is unquestionably bad for duplicity, as where a count in an indictment against the crew of a ship charged them with making a revolt and also with confining the captain: *United States v. Sharp*, Pet. C. Ct. 131. A count charging the forgery of a mortgage and also the forgery of a receipt indorsed thereon, they being distinct offenses with different punishments, is bad: *People v. Wright*, 9 Wend. 193. So a count charging a common-law nuisance and a violation of a regulation of a municipal board of health, they being differently punished: *Reed v. People*, 1 Park. Cr. 481. So where the offense of selling liquor on Sunday and the offense of allowing liquor to be drank on one's premises on Sunday are charged in the same count, such offenses being created by different statutes annexing different punishments: *Commonwealth v. Schaub*, 16 Chic. L. N. 204 (Pa.) These are distinct offenses, whereas if they arose under the same statute and were punishable in the same way they would be, when committed by one person at the same time, mere cumulative acts constituting together but a single offense. So where, in a single count, the defendant is charged with behaving rudely in a meeting-house and with disturbing public worship, offenses with different punishments created by different statutes: *Commonwealth v. Symonds*, 2 Mass. 163. So where defendants are charged in a single count with embezzlement as "agents and trustees," embezzlement by an agent and embezzlement by a trustee being distinct offenses arising under different sections of the code: *Hutchison v. Commonwealth*, 82 Pa. St. 472. So where the same count charges the disfiguring and the injuring of an ox, acts differently punishable under different sections of the statute: *McGahagin v. State*, 17 Fla. 165. So where a road supervisor is accused, in the same count, of not repairing a highway, and of not measuring it and marking it with mile-stones, offenses punishable with different penalties under different statutes: *Greenlow v. State*, 4 Humph. 25; or of failing to return a fine collected by him, of failing to apply it on the roads in his district, and of failing to pay it over to his successor: *State v. Shields*, 8 Blackf. 151. So where one subject to military duty, as a member of the state militia, is charged in the same count with independent omissions to perform such duty on different occasions: *Morse v. Eaton*, 23 N. H. 415. But in *Storrs v. State*, 3 Mo. 9, it seems to be laid down, contrary to the established rule, that, in an indictment containing but one count, distinct felonies of the same character and degree, though committed at different times, may be joined.

2. *Count Charging Distinct Acts Constituting One Offense is Good*: *State v. Palmer*, 4 Mo. 453. Thus, as stated in the principal case, a count for high treason charging several overt acts has been held to be good, because the gist of the offense is the compassing, etc., and the overt acts are merely the evidences of it: Kel. 8; Arch. Pl. & Ev., 13th Lond. ed., 54; Whart. Cr. Pl. & Pr., sec. 250; 1 Bish. Cr. Proc., 3d ed., sec. 437. A count charging sales of intoxicating liquors to different persons on the same day, as one transaction, is good, although proof of any one of such acts of selling would be sufficient to support the count: *Storrs v. State*, 3 Mo. 9; *People v. Adams*, 17 Wend. 475; *Osgood v. People*, 39 N. Y. 449; *State v. Anderson*, 3 Rich. 172; as where the count charged the defendant with selling, on a day named, to

divers persons to the grand jury unknown, divers quantities of divers liquors, to wit, three gills of brandy, three gills of whisky, three gills of cordial, three gills of bitters, etc.: *People v. Adams, supra*. To the same effect, *Osgood v. People, supra*. The stealing of different articles at the same time may be charged in a single count as one offense: Whart. Cr. Pl. & Pr., sec. 252; *State v. Holmes*, 28 Conn. 230; *State v. Johnson*, 3 Hill (S. C.), 1; *State v. Camerm*, 40 Vt. 555. So though the articles stolen are alleged to have belonged to different owners: *Lorton v. State*, 7 Mo. 55; S. C., 37 Am. Dec. 179; *State v. Nelson*, 29 Me. 329; *State v. Hennessey*, 23 Ohio St. 339; S. C., 13 Am. Rep. 253; *Fulmer v. Commonwealth*, 97 Pa. St. 503; S. C., 10 Week. Notes Cas. 437. So a count for receiving at the same time stolen goods belonging to different owners, knowing them to have been stolen, is good: *State v. Nelson*, 29 Me. 329. Such a count was, however, held bad in *Kilrow v. Commonwealth*, 89 Pa. St. 480; but it does not distinctly appear in that case that the goods were received at the same time. A count charging the burning of several houses of different owners as one act is good, being but a single offense: *Woodford v. People*, 62 N. Y. 117; S. C., 20 Am. Rep. 464. So a count for malicious mischief, in entering a church, breaking and defiling an organ belonging to a private person, and also defiling certain books and papers belonging to the church, is not bad for duplicity: *Smith v. State*, 63 Ga. 168. So a count charging the malicious killing of a horse and a colt at the same time and place, the one by poisoning and the other by stabbing, was held good, the allegations as to the mode of killing being rejected as surplusage: *Hayworth v. State*, 14 Ind. 590. But a count for malicious injury to a mare and an ox, where the proof shows that the acts were done at different times, will not warrant a conviction, it seems, unless both acts were so near the same time as to constitute substantially one transaction: *Burgess v. State*, 44 Ala. 190.

An assault upon two or more persons at the same time, constituting one transaction, may be charged in one count: Whart. Cr. Pl. & Pr., sec. 254; 1 Bish. Cr. Proc., 3d ed., sec. 437; *Regina v. Giddins*, Car. & M. 634. "Can not the king call a man to account for a breach of the peace because he broke two heads instead of one?" *Rex v. Benfield*, 2 Burr. 980. So where the charge is of an assault upon two, and of stealing two shillings from one and one shilling from the other, it may be made in one count: *Regina v. Giddins, supra*. In *Rex v. Clendon*, 2 Ld. Raym. 1572, an indictment for assault upon two persons was held bad, and judgment on a verdict of guilty was arrested, but it does not appear whether the assault was committed at the same time upon both. In *Rucker v. State*, 9 Rep. 525 (Tex.), it was held that a charge in a single count of the murder of two persons was good if it constituted one transaction. On the other hand, in *People v. Alibez*, 49 Cal. 452, a count in an indictment for the murder of three persons by administering poison to them was adjudged bad. And in *Womack v. State*, 7 Coldw. 508, it was held that in order that two felonious acts of killing may constitute a single offense something more must appear than that both the victims were killed on the same occasion and in the course of the same affray, though it was conceded that if the death of both resulted from the same felonious act it may well be but a single offense and chargeable in a single count. In that case it appeared upon the trial that the defendant shot and killed one of the victims of the homicide, and that the other ran up to prevent his shooting again, when the defendant turned and shot him also. After the testimony was closed the defendant moved that the prosecutor be required to elect upon which killing he would proceed, but the court disallowed the motion, and this adjudged to be error. Dr. Wharton says on this point that the charge of killing two

persons by a shot fired at one of them can not be made in a single count: Whart. Cr. Pl. & Pr., sec. 468. But Mr. Bishop, criticising the case of *People v. Alibez*, 49 Cal. 452, declares that, in reason, it can not be true under all circumstances that a count charging the killing of two persons is bad for duplicity, "as where one discharge of a ball from a gun killed them:" 1 Bish. Cr. Proc., 3d ed., sec. 437. If the shot was intended to kill both, it seems to us clear that the offense would be single and chargeable in a single count. So if, as in *People v. Alibez*, *supra*, poison should be administered to two or more persons with intent to kill them all, by mixing it in a single dish of food or drink, and if all should die, as the result of the act, we can not see why the offense might not be charged in one count. If a felonious assault upon two can be so charged, why should the rule be varied if the assault should result fatally? If an act intended to kill one should accidentally kill two, there might be room for grave doubt as to the propriety of charging both killings in the same count; for though both might be homicides of the same degree, yet the guilt of the defendant as to each would depend upon different considerations.

A libel upon two persons by a single act may be charged in the same count: Whart. Cr. Pl. & Pr., sec. 254; as where the defendant sang songs in front of the prosecutor's door reflecting upon the prosecutor and his daughter: *Rex v. Benfield*, 2 Burr. 980. So a count for aiding the escape of two prisoners by a single act has been held good, although the prisoners were confined on charges of different grades, and the act of aiding the escape of one was punishable more severely than that of aiding the other's escape: *Oleson v. State*, 20 Wis. 58. In that case it was held that the defendant, on conviction, was liable to the greater penalty. A count charging an attempt to take and entice away two children is not bad for duplicity, for the attempt is but one act, and one may by a single act endeavor to accomplish two criminal results: *People v. Milne*, 13 Rep. 328 (Col.) A defendant may be charged in one count with depositing in the post-office on a day named five hundred or any other number of circulars for an illegal lottery, since it is all one act, though the statute makes the deposit of a single circular a crime; but a count charging the deposit of five hundred such circulars on a day stated, and "on each and every secular day" thereafter up to a certain other day, is bad for duplicity: *United States v. Patty*, 2 Fed. Rep. 664. In *State v. Ferriss*, 3 Lea, 700, a count against a judge charging him with drawing and issuing on a day named several illegal warrants for money against the county treasury was adjudged bad for duplicity, because the drawing and issuing of each warrant was necessarily a distinct offense.

3. *Count Charging Conjunctively Cumulative Acts Constituting One Offense when Done Together.*—Where several acts, when done by the same person, are but successive stages in the progress of a criminal enterprise, constituting as a whole but one offense, though either when done alone might be an offense, they may well be charged in a single count. Thus, while it is no doubt a criminal offense to do or cause to be done or assist in doing an act prohibited under penalty by the common or statute law, all these acts may be charged against one person as one offense in a single count of an indictment: 1 Bish. Cr. Proc., 3d ed., sec. 434; *United States v. Hull*, 3 Col. L. Rep. 157 (U. S. Dist. Court, Dist. of Neb.). Thus one may in the same count be charged with the false making, forging, and counterfeiting, and causing the false making, forging, and counterfeiting, and assisting in the false making, etc., of certain coin: *Rasnick v. Commonwealth*, 2 Va. Cas. 356; or with forging, causing to be forged, and aiding in forging a certain instru

ment: *State v. Morton*, 27 Vt. 310; or with willfully and maliciously burning and causing to be burned a certain building: *State v. Price*, 11 N. J. L. 203; or with maliciously destroying or causing to be destroyed certain property: *State v. Kims*, 5 Blackf. 314; or with promoting and aiding in the promotion of a lottery: *Miller v. Commonwealth*, 13 Bush, 731; or the like: *State v. Fant*, 2 La. Ann. 837; *La Beas v. People*, 33 How. Pr. 66. Says Daxon, C. J., in *Byrne v. State*, 12 Wis. 519: "The rule is well settled that where a statute makes either of two or more distinct acts, connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting all together but one offense. In such cases the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law; and proof of either of the acts mentioned in the statute and set forth in the indictment will sustain a conviction." Or, as laid down in *State v. Murphy*, 47 Mo. 274: "When a statute in one clause forbids several things or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense; and they may all be united conjunctively in one count, and the count is sustained by proof of one of the offenses charged." To the same effect are 1 Bish. Cr. Proc., 3d ed., sec. 436; Whart. Cr. Pl. & Pr., sec. 251; *People v. Frank*, 28 Cal. 507; *State v. Burns*, 4 Rep. 168 (Conn.); *Knopf v. State*, 84 Ind. 316; S. C., 17 West. Jur. 333; *State v. Schweiter*, 27 Kan. 499; *State v. Banton*, 4 La. Ann. 32; *State v. Markham*, 15 Id. 498; *State v. Adam*, 31 Id. 717; *State v. Burgess*, 40 Me. 592; *State v. Smith*, 61 Id. 386; *State v. Flint*, 62 Mo. 393; *United States v. Fero*, 18 Fed. Rep. 901.

Thus, under a statute prohibiting selling or offering to sell intoxicating liquors to drunkards, a count for offering to sell and selling liquor to such a person is good: *Barnes v. State*, 20 Conn. 232. So generally, under a disjunctive statute, a count for advertising, exposing for sale, offering to sell, and selling lottery tickets, liquors, or other forbidden articles: *Commonwealth v. Eaton*, 15 Pick. 273; *State v. McWilliams*, 7 Mo. App. 99; *State v. Burns*, 4 Rep. 168 (Conn.) But where a statute prohibited the "carrying for sale, or offering for sale, or offering to obtain or obtaining orders for the sale," etc., of liquors, and a specific penalty was affixed for "each offer to take an order, and for each order taken, and for each sale," etc., it was held that a count charging the carrying, and offering for sale, and offering to obtain and obtaining orders, etc., conjunctively, was bad for duplicity: *State v. Smith*, 61 Me. 386. Under a disjunctive statute, also, a count for selling and bartering or selling and furnishing intoxicating liquors is good: *State v. Schweiter*, 27 Kan. 499; *State v. Woodward*, 25 Vt. 616. Or a count for keeping open a store on Sunday, and trafficking, trading, and bartering with negroes on Sunday: *State v. Meyer*, 1 Spears, 305; *State v. Helgen*, Id. 310. Or a count for keeping open a tippling-shop, and selling liquors to divers persons therein, or the like: *State v. Murphy*, 47 Mo. 274; *State v. Dean*, 11 West. Jur. 169 (Iowa). Or a count for selling liquor in unlawful quantities, and permitting the same to be drunk on the premises: *State v. Wickey*, 54 Ind. 438; *contra*, *Miller v. State*, 5 How. (Miss.) 250. Or a count for unlawfully removing intoxicating liquors upon which the tax is not paid to a place other than a distillery warehouse, and concealing the same: *United States v. Nunnemacher*, 7 Biss. 129. So a count for "keeping and exhibiting a gaming-bank called monte:" *Law-*

caster v. State, 43 Tex. 519; or for setting up and keeping or frequenting and keeping a gaming-table, and playing and inducing others to play thereat, etc.: *Hinkle v. Commonwealth*, 4 Dana, 518; *Territory v. Copely*, 1 N. M. 571; *State v. Markham*, 15 La. Ann. 498; or for permitting a gambling device to be set up and used: *State v. Fancher*, 18 Mo. 425; or for betting and being concerned in betting at faro: *Ward v. State*, 22 Ala. 16—is good under a statute prohibiting such acts disjunctively. So also under a statute prohibiting the same disjunctively, a count for buying, receiving, concealing, and aiding in concealing stolen goods is not bad for duplicity: *State v. Nelson*, 29 Me. 329; *State v. Murphy*, 6 Ala. 845. So a count for inveigling, stealing, carrying, and enticing away a slave: *Mooney v. State*, 8 Ala. 328; *State v. Banton*, 4 La. Ann. 31. So a count charging that the defendant did “assault, strike, stab, cut, wound, and disfigure” a person named: *State v. Van Zant*, 71 Mo. 541. So a count for an assault with a dangerous weapon, and with intent to kill, and for inflicting a wound less than mayhem: *State v. Adam*, 31 La. Ann. 717; *State v. Richards*, 33 Id. 1294. So under a disjunctive statute, a count for forging a note, and passing and uttering it: *People v. Frank*, 28 Cal. 507. Or for selling, exchanging, and delivering a counterfeit note: *State v. Fitzsimmons*, 30 Mo. 236. Or for uttering, publishing, and putting off counterfeit coin: *McGregor v. State*, 16 Ind. 9. Or for destroying, defacing, and injuring a register of baptism: *Regina v. Bowen*, 1 Car. & K. 501; S. C., 1 Den. C. C. 22. Or for maliciously and wantonly breaking down, injuring, removing, and destroying a dam: *State v. Burgess*, 40 Me. 592. Or for obtaining money by a cheat and fraud and false representation, and false pretense and false and bogus check: *State v. Fancher*, 71 Mo. 460. Or a count against a public officer for corruptly accepting, etc., a gift and gratuity and a promise to make a gift: *State v. Smalls*, 11 S. C. 262. Other examples illustrative of the same general rule will be found in *Commonwealth v. Twitchell*, 4 Cush. 74; *People v. De La Guerra*, 31 Cal. 459; *Boland v. People*, 25 Hun, 423; *Clemons v. State*, 4 Lea, 23.

4. *Count Charging Repugnant Acts Conjunctively* is bad for duplicity, though they are prohibited disjunctively in the statute. Thus, a count against a public officer under a disjunctive statute charging that he “did convert to his own use by way of investment in property and merchandise, and make away with and secrete” certain public moneys, has been held bad, because all the allegations could not be true: *State v. Flint*, 62 Mo. 393. So a count for “willfully and negligently” suffering an escape: *State v. Dorsett*, 21 Tex. 656. So a count for selling and giving liquor to a minor, under a disjunctive prohibition in the statute, was held bad for duplicity, in *Simons v. State*, 25 Ind. 331, because selling and giving could not be predicated of the same act; but this case is doubted in *Shafer v. State*, 26 Id. 191. And in *Eagan v. State*, 53 Id. 162, a count for selling, bartering, and giving away liquor to a drunkard was held good, because as it did not appear what was paid or exchanged for the liquor, there was no sufficient charge of a sale or barter. A similar count was held good in *State v. Bielby*, 21 Wis. 204. And in *Thompson v. State*, 37 Ark. 408, it is said that a count for selling and giving away liquor would be good under such a statute. In *Kirby v. State*, 1 Ohio St. 185, a count for uttering a “false, forged, altered, and counterfeit” bill was adjudged bad, because a bill could not be false, forged, altered, and counterfeited. But this doctrine was denied by Thurman, J., in *Stoughton v. State*, 2 Id. 566, where a count for uttering a “false, forged, and counterfeited bank note” was supported; and to the same effect are *Mackey v. State*, 3 Id. 362, and *Bailey v. State*, 4 Id. 440. A count for “unlawfully injuring

and destroying real property" was held bad for duplicity and repugnancy in *Ellis v. Commonwealth*, 78 Ky. 130; but this is contrary to the doctrine of some of the cases already cited.

5. *Count for Inclusive Offense Charging also Included Offenses.*—In Alabama it is said, *per* Goldthwaite, J., to be settled that different grades of the same felony having the same penalty may be charged in a single count of an indictment: *Ward v. State*, 22 Ala. 18. So it is held in Georgia, that different grades of the same general offense may be included in the same count, as robbery by force, and robbery by intimidation, though it is conceded to be otherwise at common law: *Long v. State*, 12 Ga. 293. And in *State v. Randall*, 41 Tex. 292, it is laid down that when though offenses be several one of them if completed necessarily includes the other, there is no such repugnancy as to prevent their joinder in the same count, and therefore that a count for establishing a lottery and for the further completed offense of disposing of property by such lottery is not bad for duplicity. A count charging that the defendant "did unlawfully, feloniously, and with malice aforethought make an assault upon one G. H., and "did then and there unlawfully, etc., kill and murder" the said G. H., is not bad for duplicity, because the assault is implied in the higher offense, but the allegation of such assault is merely superfluous: *People v. Hamilton*, 8 Pac. C. L. J. 632. So an assault is implied where a statute provides for the punishment of one who "shall with a dangerous weapon inflict a wound less than mayhem" upon another, and a count under that statute charging an assault with a dangerous weapon and a wounding is not bad, though there is another statute providing for the punishment of an assault with a dangerous weapon: *State v. Taylor*, 17 Rep. 788 (La.) See also, on a kindred point, *State v. Stouderman*, 6 La. Ann. 286. So an assault is implied in a forcible abduction, and a charge of such assault in a count for abduction, though unnecessary, does not render the count duplicitous: *People v. Ah Own*, 39 Cal. 604. A count charging that the defendants "did conspire, confederate, and agree to and did kill and murder" A. is not bad for duplicity, because the inferior charges are merged in the completed offense: *Galloway v. Commonwealth*, 1 Ky. L. Rep. & J. 720.

Burglary may be regarded as, in some sense, an inclusive crime, since when it is successful, it involves the commission of some other offense, although the commission of such other offense is not necessary to complete the burglary, the breaking with the intent to commit the subsidiary offense being sufficient. But it is well settled that where the included offense is committed, the allegation of it in a count in an indictment for common-law or statutory burglary does not render it bad for duplicity: Whart. Cr. Pl. & Pr., sec. 244; 1 Bish. Cr. Proc., 3d ed., sec. 439; *State v. Hayden*, 45 Iowa, 11; *State v. Ridley*, 48 Id. 370; *State v. Shaffer*, 59 Id. 290; *State v. Brandon*, 7 Kan. 106; *Olive v. Commonwealth*, 5 Bush, 376; *Commonwealth v. Tuck*, 20 Pick. 356; *Commonwealth v. Hope*, 22 Id. 1; *Josslyn v. Commonwealth*, 6 Met. 236; *Kite v. Commonwealth*, 11 Id. 581; *Larned v. Commonwealth*, 12 Id. 240; *Jennings v. Commonwealth*, 105 Mass. 586; *Commonwealth v. Darling*, 129 Id. 112; *Roberts v. State*, 55 Miss. 421; *Smith v. State*, 57 Id. 822; *Breese v. State*, 12 Ohio St. 146; *Davis v. State*, 3 Coldw. 77; *Dunham v. State*, 9 Tex. App. 330; *Speers v. Commonwealth*, 17 Gratt. 570; *Vaughan v. Commonwealth*, Id. 576. So, whether the subsidiary offense is larceny of goods of the owner of the building, as is generally the case in the decisions above referred to, or larceny of goods of a third person: *State v. Brady*, 14 Vt. 353; or an assault and battery: *Smith v. State*, 57 Miss. 822. The commission of the subsidiary offense is evidence of the intent, and may be rejected as surplusage: *State v. Hayden*.

45 Iowa, 11; *State v. Ridley*, 48 Id. 370; *State v. Shaffer*, 59 Id. 290; *Olive v. Commonwealth*, 5 Bush, 376; *Commonwealth v. Hope*, 22 Pick. 1; *Davis v. State*, 3 Coldw. 77; *Speers v. Commonwealth*, 17 Gratt. 570; *Vaughan v. Commonwealth*, Id. 576. Nor is the indictment bad because the subsidiary offense is insufficiently alleged: *Larned v. Commonwealth*, 12 Met. 240. On a general verdict of guilty the defendant is to be sentenced for the burglary only: *Commonwealth v. Hope*, 22 Pick. 1; *Josslyn v. Commonwealth*, 6 Met. 236; *Davis v. State*, 3 Coldw. 77. In *State v. Ridley*, 48 Iowa, 370, and *Kite v. Commonwealth*, 11 Met. 581, it was held that a conviction of larceny under such an indictment was bad. But the contrary is held in *State v. Brandon*, 7 Kan. 106; *Vaughan v. Commonwealth*, 17 Gratt. 576. And in several other cases it is held that the prosecution may dismiss or *nol. pros.* as to the burglary, even after verdict, and take a conviction for the larceny only, if sufficiently alleged: *Commonwealth v. Tuck*, 20 Pick. 356; *Jennings v. Commonwealth*, 105 Mass. 586; especially where the burglary is insufficiently charged: *Dunham v. State*, 9 Tex. App. 330. Where a count in an indictment charged burglary with intent to steal the goods of the owner of the house, and also the stealing, in such house, of the goods of a third person, it was held that a general verdict covered both offenses: *State v. Brady*, 14 Vt. 353. In *Commonwealth v. Darling*, 129 Mass. 112, it was held that in one or in several counts one defendant might be charged with burglary and larceny, and another with receiving the stolen goods.

6. *Count Charging One Offense with Aggravation or with Defective Allegation of Another.*—A count charging an offense and alleging distinct matters of aggravation, which might of themselves constitute a distinct offense, has been held not to be bad for duplicity. As where a count for an aggravated assault charges the use of a dangerous weapon as one of the matters of aggravation: *Tucker v. State*, 6 Tex. App. 251. See also *State v. Collins*, 33 La. Ann. 152. Or where beating, bruising, and wounding with the hands and feet is alleged in a count for an assault with a dangerous weapon: *McKinney v. State*, 25 Wis. 378. Certainly where a count charges one offense, and defectively charges another, the latter charge is surplusage, and there is no duplicity: *State v. Palmer*, 35 Me. 9; *Commonwealth v. Simpson*, 9 Met. 138; *Commonwealth v. Powell*, 8 Bush, 7. So where a count charges the commission of an offense on a day certain, and “divers other days:” *Cook v. State*, 56 Am. Dec. 410; *State v. Kobe*, 26 Minn. 148. Setting out the various means by which an offense was committed, though there may be an incidental allegation of other offenses, will not vitiate a count: Whart. Cr. Pl. & Pr., sec. 254; *United States v. Watkins*, 3 Cranch, 441, 545.

7. *Other Exceptions to Rule against Duplicity.*—Misnaming an offense, by denominating one crime and setting out facts showing it to be another, does not render a count bad for duplicity; as where a defendant is charged *eo nomine* with an “assault with intent to commit murder,” and the real charge was the administration of poison with intent to kill: *People v. Cuddihy*, 54 Cal. 53. A count charging that the defendant “did kill, steal, and carry away a hog” does not allege both a malicious mischief and a larceny, but merely the stealing of a dead hog where the statute recognizes such an offense: *Thompson v. State*, 30 Tex. 356. Where a count charges the sending of a “false writing and affidavit” to the pension office under the act of congress of March 3, 1823, if the recitals show that the writing and affidavit were the same instrument there is no duplicity: *United States v. Corbin*, 11 Fed. Rep. 238 (Cir. Ct., Dist. of N. H.)

8. *Remedies for Duplicity in Single Count.*—There is no doubt that an

indictment joining distinct offenses in the same count may be quashed, and that a motion to quash is the proper remedy: 1 Bish. Cr. Proc., 3d ed., sec. 442; *State v. Weil*, 89 Ind. 286; *Knopf v. State*, 84 Id. 316; S. C., 17 West. Jur. 333; *State v. Palmer*, 35 Me. 9; *Fulmer v. Commonwealth*, 97 Pa. St. 503; S. C., 10 Week. Notes Cas. 437; *Nash v. Regina*, 9 Cox C. C. 424; S. C., 10 Jur., N. S., 819; 4 Best & S. 935; 9 L. T., N. S., 716; or the defect may be ground of demurrer: 1 Bish. Cr. Proc., 3d ed., sec. 442; *People v. Shotwell*, 27 Cal. 394; *People v. Hunt*, 47 Id. 106. But the general rule is that a verdict cures the defect, and that it is not available on a motion in arrest of judgment or writ of error: 1 Bish. Cr. Proc., 3d ed., sec. 443; Whart. Cr. Pl. & Pr., sec. 255; *State v. Holmes*, 28 Conn. 230; *Commonwealth v. Tuck*, 20 Pick. 356; *Hildebrand v. State*, 5 Mo. 548; *Kilrow v. Commonwealth*, 89 Pa. St. 489; *State v. Johnson*, 3 Hill (S. C.), 1. So especially where there is a verdict of guilty of one of the offenses and a *nolle prosequi* as to the other: *Kilrow v. Commonwealth*, 89 Pa. St. 489. So held, also, where a felony and a misdemeanor were charged in the same count, and there was a general verdict of guilty: *Hildebrand v. State*, 5 Mo. 548. On the other hand, it has been held in a number of cases that a defect of this sort is ground for a motion in arrest of judgment: *State v. Nelson*, 8 N. H. 163; *State v. Fowler*, 28 Id. 184; *People v. Wright*, 9 Wend. 193; *Woodford v. People*, 62 N. Y. 117; S. C., 20 Am. Rep. 464.

9. *Applicability of Doctrine to Misdemeanor and to Other Criminal Complaints than Indictments.*—It has been doubted whether duplicity can be urged as an objection to an indictment for misdemeanor: 1 Ch. Cr. L. 54; *Byrne v. State*, 12 Wis. 526. In other cases it has been held to be only a formal defect for which an indictment for misdemeanor can not be quashed: *Shafer v. State*, 26 Ind. 191; *State v. Wickey*, 54 Id. 438; *State v. Cummins*, 78 Id. 251. These cases, however, seem to use the term “duplicity” indiscriminately to mean, not only the charging of two offenses in the same count, but also the joinder of several counts for different offenses. Complaints or affidavits before a justice and grand jurors’ complaints are not held to the same strictness as indictments with respect to duplicity. There is no such thing, properly speaking, as counts in an affidavit: *Deveny v. State*, 47 Ind. 208; *State v. Holmes*, 28 Conn. 230.

JOINDER OF COUNTS FOR SEVERAL OFFENSES IN SAME INDICTMENT.—As matter of strict law, there is no reason why any number of counts for any number or kind of offenses may not be joined in the same indictment where not otherwise provided by statute: 1 Bish. Cr. Proc., secs. 424, 425, 444. Indeed, the allowance of different counts in indictments implies this, for every count on its face imports a different offense: *Young v. The King*, 3 T. R. 106, *per* Buller, J.; except of course where the indictment itself states, as required by some statutes, that its several counts are for the same offense. The practice of uniting several counts in an indictment is, however, of comparatively modern origin: *O’Connell v. Queen*, 11 Cl. & Fin. 375, *per* Lord Denman; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; S. C., 19 Am. Rep. 223, *per* Allen, J. It is obvious, also, that this practice, if uncontrolled by a wise judicial discretion, might easily lead to great oppression. As is shown in an able brief of the late Mr. O’Conor, approvingly quoted by Mr. Justice Allen in *People ex rel. Tweed v. Liscomb*, *supra*, if the prosecution were permitted to heap up charges against a prisoner in the same indictment, and to try all before the same jury, it might not only overwhelm him with confusion in his defense, but break him down with a weight of obloquy before he had had an opportunity to defend. The attention of the

jury might be so distracted by the multiplicity of charges, and by an imposing array of suspicious circumstances applying to the different counts, as to convict upon all, although if the accusations were tried singly, there could be no conviction upon any. Hence, as a matter of practice, it has been found necessary, particularly in grave offenses, for the courts, as matter of discretion, to impose certain limitations upon the prosecution in this respect.

1. *Rule as to Felonies.*—The general rule is, that counts for several felonies of the same general nature, and requiring the same mode of trial and punishment differing only in degree, may be joined in the same indictment, subject to the power of the court to quash the indictment or compel an election or severance, as hereinafter stated: 1 Bish. Cr. Proc., 3d ed., sec. 446; Whart. Cr. Pl. & Pr., sec. 285; *Rex v. Jones*, 2 Camp. 131; *Young v. The King*, 3 T. R. 98; *United States v. Peterson*, 1 Wood. & M. 306; *United States v. O'Callahan*, 6 McLean, 596; *State v. Crank*, 23 Am. Dec. 117; *Bulloch v. State*, 54 Id. 369; *Hampton v. State*, 47 Id. 599; *Johnson v. State*, 29 Ala. 62; *Cawley v. State*, 37 Id. 152; *Baker v. State*, 4 Ark. 56; *Hoskins v. State*, 11 Ga. 92; *Gilbert v. State*, 65 Id. 449; *State v. Cazeau*, 8 La. Ann. 109; *State v. Cook*, 20 Id. 145; *State v. Nelson*, 29 Me. 329; *State v. Hood*, 51 Id. 363; *Carlton v. Commonwealth*, 5 Met. 532; *Pettes v. Commonwealth*, 126 Mass. 242; *Commonwealth v. Darling*, 129 Id. 112; *State v. Porter*, 26 Mo. 201; *Wash v. State*, 14 Smed. & M. 120; *Kane v. People*, 8 Wend. 203; *People v. Gates*, 13 Id. 311; *Taylor v. People*, 5 N. Y. Week. Dig. 359; *Nicholson v. Commonwealth*, 96 Pa. St. 503; S. C., 91 Id. 390; *State v. Priester*, Cheves, 103; *State v. Tidwell*, 5 Strobb. 1; *State v. Scott*, 15 S. C. 434; *Cash v. State*, 10 Humph. 111; *Tillesy v. State*, 10 Lea, 35; *Weathersby v. State*, 1 Tex. App. 643; *Waddell v. State*, Id. 720; *Ketchingman v. State*, 6 Wis. 426. Thus there may be joinder of distinct arsons: *State v. Smalley*, 50 Vt. 736; or distinct burglaries: *State v. Nelson*, 14 Rich. 169; or distinct larcenies of goods of different owners at the same time or at different times: *Regina v. Heywood*, 1 Leigh & C. 451; S. C., 9 Cox C. C. 479; S. C., 10 L. T., N. S., 464; *Bell v. State*, 42 Ind. 335; *State v. Nelson*, 29 Me. 329; *Barton v. State*, 18 Ohio, 221; *Cash v. State*, 10 Humph. 111; or distinct offenses of receiving stolen goods: 10 Cush. 530. So counts for burglary and larceny or burglary and receiving stolen goods may be joined: *Ex parte Petters*, 2 McCrary, 403; *Dodd v. State*, 33 Ark. 517; *Gilbert v. State*, 65 Ga. 449; *Short v. State*, 63 Ind. 376; *State v. Malloy*, 30 La. Ann., pt. 1, 61; *State v. Depass*, 31 Id. 487; *Josslyn v. Commonwealth*, 6 Met. 236; *Commonwealth v. Darling*, 129 Mass. 112; *State v. Strickland*, 10 S. C. 191; *Speers v. Commonwealth*, 17 Gratt. 570; or counts for larceny and receiving stolen goods: *Rex v. Galloway*, 1 Moo. C. C. 234; *United States v. Prior*, 5 Cranch C. Ct. 37; *Johnson v. State*, 61 Ga. 212; *State v. McLane*, 4 La. Ann. 435; *State v. Banton*, Id. 31; *State v. Crosby*, Id. 434; *Commonwealth v. O'Connell*, 12 Allen, 451; *People v. Bruno*, 6 Park. Cr. 657; *State v. Speight*, 69 N. C. 72; *State v. Jones*, 82 Id. 685; *Dowdy v. Commonwealth*, 9 Gratt. 727; or counts for larceny and embezzlement: *Murphy v. People*, 15 Rep. 300 (Ill.); *Griffith v. State*, 36 Ind. 406; *State v. Porter*, 26 Mo. 201; *Coats v. People*, 4 Park. Cr. 662; *contra*, *People v. De Coursey*, 61 Cal. 134. So counts for forgery and uttering the forged instrument: *People v. Shotwell*, 27 Id. 394; *Hoskins v. State*, 11 Ga. 92; *Parker v. People*, 11 Rep. 294 (Ill.); *State v. McCormack*, 56 Iowa, 585; *State v. Henry*, 59 Id. 391, overruling *State v. Nichols*, 38 Id. 110; *People v. Rynders*, 12 Wend. 425; *Boles v. State*, 13 Tex. 650. So counts for offenses of the same nature at common law and under a statute may be joined: Whart. Cr. Pl. & Pr., sec. 288; *State v. Thompson*, 47 Am. Dec. 588; *Wooster v. State*, 55 Ala. 217;

Commonwealth v. Kimball, 7 Gray, 328; *Commonwealth v. Ismahl*, 134 Mass. 201; *State v. Williams*, 2 McCord, 301. So counts for offenses of the same kind or different grades of the same offense arising under different statutes: *Rex v. Johnson*, 2 Leach, 1103; *State v. Tidwell*, 5 Strobb. 1. Numerous other illustrations might be given, but these must suffice.

If an indictment, in any of the cases above mentioned, charges entirely distinct offenses in several counts, the court may, on motion, quash the indictment, or with or without motion compel the prosecutor to elect on which count he will proceed, as soon as the fact is discovered: Whart. Cr. Pl. & Pr., sec. 290; *Young v. The King*, 3 T. R. 106; *Regina v. Barry*, 4 F. & F. 389; *Regina v. Heywood*, 1 Leigh & C. 451; S. C., 9 Cox C. C. 479; S. C., 10 L. T., N. S., 464; *Regina v. Brannon*, 14 Cox C. C. 394; *United States v. Bennett*, 9 Rep. 136; *Gilbert v. State*, 63 Ga. 449; *State v. Smith*, 8 Blackf. 489; *State v. McPherson*, 9 Iowa, 53; *State v. Flye*, 26 Me. 312; *State v. Nelson*, 29 Id. 329; *Pettes v. Commonwealth*, 126 Mass. 242; *State v. Porter*, 26 Mo. 201; *Kane v. People*, 8 Wend. 203; *People v. Gates*, 13 Id. 311; *State v. Jones*, 82 N. C. 685; *State v. Nelson*, 14 Rich. 172; *State v. Scott*, 15 S. C. 436; *Cash v. State*, 10 Humph. 111; *Fisher v. State*, 33 Tex. 792; *Simms v. State*, 10 Tex. App. 131; *State v. Smalley*, 50 Vt. 736; *Mowbray v. Commonwealth*, 11 Leigh, 643; otherwise where the several counts are founded upon the same transaction and are varied merely to meet the proofs: Whart. Cr. Pl. & Pr., sec. 290, 293; *Young v. The King*, 3 T. R. 98; *Regina v. Trueman*, 8 Car. & P. 727; *Regina v. Fussell*, 3 Cox C. C. 291; *Regina v. Davis*, 3 F. & F. 19; *Baker v. State*, 4 Ark. 56; *McGregor v. State*, 16 Ind. 9; *Griffith v. State*, 36 Id. 406; *Mershon v. State*, 51 Id. 14; *State v. House*, 55 Iowa, 466; *State v. Cazeau*, 8 La. Ann. 109; *Candy v. State*, 1 N. W. Rep. 110 (Neb.); *State v. Flye*, 26 Me. 312; *State v. Canterbury*, 28 N. H. 195; *State v. Lincoln*, 49 Id. 464; *State v. Porter*, 26 Mo. 201; *State v. Turner*, 63 Id. 436; *Sarah v. State*, 28 Miss. 267; *State v. Pitts*, 58 Id. 556; *People v. White*, 55 Barb. 606; *Taylor v. People*, 12 Hun, 212; *State v. Morrison*, 85 N. C. 561; *La Beau v. People*, 33 How. Pr. 66; *State v. Scott*, 15 S. C. 434; *Gonzales v. State*, 12 Tex. App. 657; *Dowdy v. Commonwealth*, 9 Gratt. 727.

But it is discretionary with the court to quash or compel an election for misjoinder of counts in an indictment: 1 Stark. C. P. 36; Whart. Cr. Pr. & Pl., sec. 295; 1 Bish. Cr. P., sec. 449; *Rex v. Johnson*, 2 Leach, 1105; *Young v. The King*, 3 T. R. 98; *Rex v. Galloway*, 1 Moo. C. C. 234; *People v. Shotwell*, 27 Cal. 394; *Short v. State*, 63 Ind. 376; *Beaty v. State*, 82 Id. 228; *Commonwealth v. Hills*, 10 Cush. 530; *People v. Baker*, 3 Hill (N. Y.), 159; *Bailey v. State*, 4 Ohio St. 440. It is reasonable to require an election: *Rex v. Galloway*, 1 Moo. C. C. 234. But a refusal to compel an election is not assignable as error: 1 Stark. C. P. 36; Whart. Cr. Pr. & Pl., sec. 295; *Beaty v. State*, 82 Ind. 228; *People v. Baker*, 3 Hill, 159; *Bailey v. State*, 4 Ohio St. 440. At common law, a demurrer will not lie for misjoinder of counts in an indictment: *King v. Kingston*, 8 East, 41; *State v. Crank*, 23 Am. Dec. 117; *Wash v. State*, 14 Smed. & M. 120. But it is otherwise in some of the states, where there are express statutes prohibiting the joinder of more than one offense in the same indictment: *State v. Rhea*, 38 Ark. 555; *People v. Shotwell*, 27 Cal. 394; *People v. Quoise*, 56 Id. 396; *People v. De Coursey*, 61 Id. 134. After general verdict the prosecutor may, it seems, enter a *nol. pros.* as to one of the counts, in case of misjoinder, and the defect will be cured: *State v. Crosby*, 4 La. Ann. 434; *State v. Jones*, 82 N. C. 685. So the misjoinder is cured by acquittal on one of the misjoined counts: *Commonwealth v. Packard*, 5 Gray, 101; *Commonwealth v. Holmes*, 103 Mass. 440; *Commonwealth v. Adams*, 127

Id. 15. Indeed, after verdict, the general rule is that it is too late to raise the objection of misjoinder by motion for a new trial, or for arrest of judgment, or by appeal, or otherwise: 1 Stark. C. P. 63; 1 Bish. Cr. P., sec. 449; *Rex v. Johnson*, 2 Leach, 1105; *Regina v. Heywood*, Leigh & C. 451; *United States v. Peterson*, 1 Woodb. & M. 306; *State v. Crank*, 23 Am. Dec. 117; *Johnson v. State*, 29 Ala. 62; *Cawley v. State*, 37 Id. 152; *People v. Shotwell*, 27 Cal. 394; *State v. Henry*, 59 Iowa 391; *Wash v. State*, 14 Smed. & M. 120; *State v. Fowler*, 28 N. H. 184; *People v. Bruno*, 6 Park. Cr. 657; *State v. Reel*, 80 N. C. 442; *Thompson v. People*, 4 Neb. 524; *Commonwealth v. Stinger*, 11 Rep. 821 (Pa.); *Weathersby v. State*, 1 Tex. App. 643; *State v. Nelson*, 14 Rich. 169; *State v. Hooker*, 17 Vt. 658; *Kelchingham v. State*, 6 Wis. 426. But misjoinder is held to be available on motion in arrest of judgment in *Stephen v. State*, 11 Ga. 225; *State v. Cherry*, 1 Swans. 160.

2. *Joinder of Felony and Misdemeanor*.—Under the common-law rule, where there can be no conviction for misdemeanor on an indictment for felony, counts for felony and misdemeanor should not be joined: 1 Bish. Cr. P., sec. 445; *Rex v. Gough*, 1 Moo. & R. 71; *Hilderbrand v. State*, 5 Mo. 548; *Davis v. State*, 57 Ga. 66; *Gilbert v. State*, 65 Id. 449; *Weathersby v. State*, 1 Tex. App. 643; *United States v. Scott*, 4 Biss. 29. But such misjoinder is no ground for motion in arrest of judgment: *State v. Strickland*, 10 S. C. 191; *Regina v. Ferguson*, 6 Cox C. C. 454; S. C., 29 Eng. L. & Eq. 536. But where on an indictment for felony a conviction for a misdemeanor is allowable, counts for felony and misdemeanor, growing out of the same transaction, and of the same general nature and course of trial, may be joined: 1 Bish. Cr. P., sec. 446; Whart. Cr. Pr. & Pl., sec. 291; *Commonwealth v. McLaughlin*, 12 Cush. 612, 615; *State v. Lincoln*, 49 N. H. 464; *State v. Morrison*, 85 N. C. 561; *Barton v. State*, 18 Ohio, 221; *Henwood v. Commonwealth*, 52 Pa. St. 424; *Hunter v. Commonwealth*, 79 Id. 503; *Hutchison v. Commonwealth*, 82 Id. 478.

3. *Counts for Distinct Misdemeanors* may always be joined and a conviction had for each, and the indictment will not be objectionable at any stage of the proceedings except where there is a statute prohibiting joinder of two or more offenses in the same indictment: 1 Bish. Cr. P., sec. 452; Whart. Cr. Pr. & Pl., sec. 285; *Rex v. Jones*, 2 Camp. 131; *Regina v. Braun*, 9 Cox C. C. 284; *Covv v. State*, 4 Port. 186; *Quinn v. State*, 49 Ala. 353; *Wooster v. State*, 55 Id. 223; *Lynes v. State*, 46 Ga. 208; *Cammonwealth v. McChord*, 2 Dana, 242; *State v. Kibby*, 7 Mo. 317; *Kane v. People*, 8 Wend. 203; *People v. Costello*, 1 Denio, 83; *Waddell v. State*, 1 Tex. App. 720; *Gage v. State*, 9 Id. 259; *State v. Gummer*, 22 Wis. 441. In the celebrated Tweed case there were two hundred and twenty distinct counts in the indictment, and the defendant was convicted on two hundred and four; a judgment imposing cumulative punishments was however held erroneous except as to one of the terms of punishment: *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559. But this decision is not in accordance with the rule in other states: Whart. Cr. Pr. & Pl., sec. 910.

PRITCHETT v. STATE.

[22 ALABAMA, 89.]

EVIDENCE THAT DECEASED WAS "TURBULENT AND QUARRELSOME MAN," ON TRIAL FOR MURDER, is inadmissible by way of justification or excuse, although the deceased had threatened the prisoner's life, where it is shown that the prisoner sought him out and shot him, without any attempt on his part to execute his threats.

PRIOR THREATS AND DESPERATE CHARACTER OF DECEASED, IN CASE OF MURDER, are competent evidence in connection with evidence of his conduct at the time of the killing, where there are circumstances tending to show that the killing was in self-defense, but they do not justify seeking him out and killing him.

ERROR to reverse a conviction for murder. The opinion states the case.

D. C. Humphreys, for the plaintiff in error.

M. A. Baldwin, attorney general, contra.

By Court, CHILTON, C. J. The prisoner was indicted in the circuit court of Madison county for the murder of one Henry Stammers. Upon his arraignment he pleaded not guilty, was tried and convicted of murder in the second degree, and sentenced by the court to confinement in the penitentiary for the term of ten years.

The proof induced to show that ill feeling had grown up between the deceased and the prisoner, on account of a warrant sued out by the latter against the deceased, before a justice of the peace; that the deceased had made threats of personal violence against the prisoner, which had been communicated to him; and that, on the morning preceding the day when he was killed, the deceased had gone to the field in which the prisoner had been plowing, and with a pistol in one hand and a rock or stick in the other, had forbid the prisoner going to his plow; and just before the killing the prisoner was seen starting from his house, priming his gun and picking his flint, and crying; that he proceeded to the premises of the deceased, and found him near his home; told him in a loud voice, "Stop, I have come to shoot you;" that the deceased stopped and turned round, was fired at by the prisoner, and killed immediately.

The prisoner proved that he was a peaceable, orderly man hitherto; and the same witness who proved the prisoner's good character was asked by the prisoner's counsel, if he knew the character of the deceased; whether he was a turbulent and quarrelsome man, or a peaceable and orderly one. The circuit court, on objection of the solicitor, refused to permit the witness to answer this question, and this refusal is the only matter complained of as error.

We are referred by the counsel for the prisoner to the case of *Quesenberry v. State*, 8 Stew. & P. 308, as an authority favoring the admission of the proof sought to be elicited by this interrogatory. In that case, while it was admitted "that

the good or bad character of the deceased could have no influence, as an abstract proposition, upon the guilt of the accused," yet it was said there might be cases where the killing was attended with such circumstances as rendered its character doubtful, and in which the general character of the accused might sometimes afford a clew to the truth; that it was an acknowledged principle, that if, at the time the deadly blow was inflicted, the prisoner who so inflicted it had well-founded reasons to believe himself in imminent peril, without having, by his fault, produced the exigency, such killing would not be murder. The court further says: "If the deceased was known to be quick and deadly in his revenge of imagined insults—was ready to raise a deadly weapon on very slight provocation, or, in the language of the counsel, his 'garments were stained with many murders,' when the slayer had been menaced by such a one, he could find some excuse in the strongest impulses of our nature in anticipating the purposes of his antagonist. The language of the law in such case would be, 'Obey that impulse to self-preservation, even at the hazard of the life of your adversary.'"

I have quoted thus largely from that case, in order that, upon a principle of law of so much delicacy and importance, this court might avail itself of the occasion to limit and guard the strong expressions employed by the judge who delivered the opinion, and to correct any misapprehension of the law to which it may have given rise. That there may be cases where the known temper and disposition of the deceased, prompting him to cruelty, deadly revenge, and recklessness of human life, may be so connected with acts indicating an intention on his part to take the life of the slayer, or to inflict some great bodily harm, as to become a part of the *res gestæ*, and to justify the slayer in resorting to more prompt and energetic measures of self-defense, we do not deny. But whatever may be a man's character for desperation and recklessness, he is entitled to the protection of the law; and it is as much a crime in the eye of the law to slay him as it is the most peaceable and law-abiding citizen in the community. Yet the law, having respect to the nature of man, and aiming to arrive at the true intent and motive which characterize acts prohibited by it, allows every fact and circumstance immediately connected with the act, and which tend to elucidate and explain its nature and character, or the motive and intent which moved to its perpetration, to be given in evidence. It endeavors to adjust the measures of defense to the

nature of the assault, and in doing this, it permits the party assailed to view the assailant just as he is; for it is chiefly from a knowledge of the true condition of the parties at the time the act is done that we can arrive at the motives which may reasonably be supposed to have influenced them: *Oliver v. State*, 17 Ala. 598. An act performed by a quick, impulsive, blood-thirsty, abandoned man might afford much stronger evidence that the life of the party assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation. In such case, the act and *status* of the actor must be taken together, in order to arrive at a just conclusion respecting its nature. Thus it is the character of the deceased may become a legitimate subject of inquiry, as connecting itself with the transaction which it may serve to explain. But however bad or desperate that character may be, and however many threats such person may have made, he forfeits no right to his life until by an actual attempt to execute his threats, or by some act or demonstration at the time of killing, taken in connection with such character or threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own, or to prevent some felony upon his person. And when a homicide takes place under such circumstances as tend to show that the slayer acted in self-defense, the previous threats of the deceased, his conduct upon the fatal occasion construed with reference to his known character and peculiarities having relation to such conduct and tending to explain it, all enter into and form parts of the transaction, and may be properly received as evidence.

If the quotation we have made from the case of *Quesenberry v. State, supra*, goes to support the view taken by the counsel for the prisoner in this case, namely, that because a man of "turbulent and quarrelsome disposition" has threatened to take the life of another, the party menaced may seek him out at his own house and kill him, thus "anticipating his antagonist's purposes in obedience to the impulse of his nature to self-preservation," we should not hesitate to declare that it was not the law; but taking the whole decision together, we do not so understand it. In such case, the character of the deceased is altogether immaterial, as it affords, be it never so bad, no justification or excuse for the killing; and the court should exclude all evidence concerning it. "The rule," says an American author, "undoubtedly

is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*; for it would be a barbarous thing to allow A. to give as a reason for his killing B. that B.'s disposition was savage and riotous: Wharton's Cr. L. 172; see also *State v. Field*, 14 Me. 248; *Commonwealth v. York*, 7 Law Rep. 507; *Wright v. State*, 9 Yerg. 342.

Under the view of the law which we have above expressed, and the circumstances described by the proof in this cause, it is very clear the court did not err in excluding the proof.

The judgment and sentence of conviction must consequently be affirmed.

EVIDENCE OF DECEASED'S VIOLENT CHARACTER inadmissible in defense under an indictment for murder or manslaughter, when: See *State v. Field*, 31 Am. Dec. 52; *State v. Chandler*, 52 Id. 599.

PRIOR THREATS OF DECEASED several weeks before the killing will not mitigate the offense to manslaughter or justifiable homicide, if the killing was not necessary in self-defense: *State v. Scott*, 42 Am. Dec. 148.

HOMICIDE JUSTIFIABLE ON GROUND OF SELF-DEFENSE, WHEN: See *Shorter v. People*, 51 Am. Dec. 286, and note.

SEABURY v. DOE EX DEM. STEWART.

[22 ALABAMA, 207.]

VENDOR MAY BRING EJECTMENT AGAINST VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT of purchase upon the latter's failure to comply with the terms of the contract.

VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT IS ESTOPPED TO IMPUGN TITLE of the vendor, or to set up an outstanding title in ejectment against him after his failure to pay.

POSSESSION OF VENDEE UNDER EXECUTORY CONTRACT IS NOT ADVERSE to his vendor.

VENDEE FAILING TO COMPLY WITH CONTRACT IS NOT ENTITLED TO COMPENSATION FOR IMPROVEMENTS made by him while in possession, upon recovery of the premises by the vendor.

VENDOR HAS ELECTION TO TREAT VENDEE AS TENANT OR TRESPASSER where the latter has been let into possession and fails to comply with his contract.

VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT IS NOT ENTITLED TO NOTICE OF RESCISSION before ejectment by the vendor, where he fails to pay according to contract.

VENDOR CONVEYING TO STRANGER AFTER DEFAULT OF VENDEE in possession in not paying according to contract does not release the latter or render his possession adverse to the vendor's grantee, and the latter stands in the vendor's shoes; so where the vendor's executors, having power to sell, convey to a stranger after the vendee's default.

VENDEE CAN NOT AVAIL HIMSELF OF OUTSTANDING TITLE DISCLOSED BY VENDOR in his evidence, or by a grantee of the vendor, so as to prevent a recovery in ejectment, where he is in possession under a contract of purchase, and is in default as to payment.

GRANTEE OF VENDOR IS NOT ESTOPPED BY ACCEPTING TRUST DEED OF PREMISES FROM VENDEE in possession as security for a debt due another, from recovering the premises in ejectment, against the vendee, upon the latter's failure to comply with his contract of purchase.

PARTY CAN NOT COMPLAIN OF ERROR COMMITTED ON HIS MOTION.

DECISION ON MATTER OF DISCRETION IS NOT REVISABLE ON ERROR.

WHERE JOINT DEMISE BY THREE IS ALLEGED, AND NAMES OF TWO ARE STRUCK OUT on the defendant's motion in an action of ejectment, he can not complain because the name of the third was permitted to remain, purporting a sole demise.

ERRONEOUS ADMISSION OF EVIDENCE, WHICH BECOMES IRRELEVANT and immaterial by the exclusion of evidence which it was intended to rebut, is no ground of reversal.

EJECTMENT brought by the defendants in error against the plaintiff in error. The plaintiffs below laid several demises, and among others a demise from Stewart & Easton, and a joint demise from William and Samuel Kitchen and Susan Kennedy, heirs of Samuel Kitchen; but on motion of the defendant the names of William and Samuel Kitchen were struck out on their affidavit that their names were used without their authority, and the name of Susan Kennedy was permitted to stand alone, notwithstanding a subsequent objection by the defendant that her name should be deemed stricken out also, because the demise was alleged to be joint. The defendant admitted possession. It appeared from evidence introduced by the plaintiffs that the premises in question were conveyed to Stewart & Easton, the plaintiffs' lessors, in 1847, by the executors of Joshua Kennedy, deceased, they having power under his will to sell and convey his realty; that the said Joshua Kennedy, in 1835, had contracted to sell the premises to the defendant upon certain terms; and that the defendant was let into possession under the contract, but had never paid the purchase money as therein stipulated. The plaintiffs also introduced a United States patent for the premises to Samuel Kitchen, deceased, dated in 1841. They also proved possession in Joshua Kennedy and his tenants from 1819 to the time of the agreement with the defendant, and introduced, against the defendant's objection, certain declarations of Samuel Kitchen tending to show that he admitted Kennedy to be the owner, and was ready to convey to him. The defendant introduced in evidence a trust deed of the premises executed by him in 1838 to Easton, one of the plaintiffs' lessors, as trustee,

to secure a debt due one Wiswall, and a subsequent deed of release from Wiswall to the defendant. He also introduced a conveyance of the premises from Samuel Kitchen to Wiswall, dated in 1851, and a lease from Wiswall to the defendant. There was also some evidence tending to show an abandonment by the defendant of his contract with Kennedy, prior to the conveyance by the executors to Stewart & Easton. The substance of the instructions of the court is stated in the opinion. The defendant asked certain other instructions, which were refused. The first is sufficiently stated in the opinion. The others were in substance as follows: 2. That the conveyance by the executors to Stewart & Easton was a violation of Kennedy's agreement with the defendant, whereby he was released, and his possession became adverse. 3. That the plaintiffs, having themselves shown an outstanding title in Kitchen's heirs with which they had not connected themselves, could not recover on Kennedy's title. 4. That the trust deed from the defendant to Easton and the recitals therein estopped Stewart & Easton from recovering against the defendant. 5. That as the plaintiffs' right to recover rested on two demises, one from Stewart & Easton and one from Susan Kennedy, which were not connected by any conveyance, the jury, if they found for the plaintiffs, must state on which demise. In answer to the third request, the court charged that if the plaintiffs and defendant both claimed under Kennedy, the plaintiffs could recover notwithstanding their having proved a patent to Kitchen. In answer to the fifth request, the court stated that if the jury found for the plaintiffs for only a part of the property, it would be on Susan Kennedy's demise; but if they found for the whole, a general verdict for the plaintiffs would be sufficient. Verdict and judgment for the plaintiffs, and the defendant brought error.

P. Phillips, for the plaintiff in error.

George N. Stewart, contra.

By Court, GIBBONS, J. The charge of the court below as given to the jury, in our opinion, under the proof, contains no error. It is predicated upon principles of law now too well established to be questioned, or to require affirmative argument. The charge asserts simply that where a party under an executory agreement of purchase enters into the possession of lands, and fails to comply with the terms of his contract in the payment of the purchase money, the vendor has the right to bring ejectment against him and recover back his lands. The charge

further asserts that in such a case the vendee can not dispute the title of the vendor, nor set up an outstanding title to defeat his recovery; that the possession of the vendee is not adverse to the vendor, in the legal sense of that term, but consistent with his title; and therefore the vendor has the right, even before he regains the actual *pedis possessio* of the land to pass the title to a third party by deed; and if he is put to a suit for the recovery of the premises, he has the right to take them free of any charge for improvements which may have been made while in the possession of the such vendee. All of these propositions we think correct as applied to the proof, and the court was warranted in announcing them to the jury: *Hamilton v. Taylor*, Lit. Sel. Cas. 444; *Baker v. Gittings*, 16 Ohio, 485; *Wright v. Moore*, 21 Wend. 230; *Whiteside v. Jackson*, 1 Id. 418; *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]; *Jackson v. Stewart*, 6 Id. 34.

The vendor of premises, under circumstances such as are disclosed by the record, after such default in payment of the purchase money, has the right, at his election, to treat the vendee as his tenant, and recover against him for the use and occupation of the land: *Davidson v. Ernest*, 7 Ala. 817; or he may treat him as a trespasser, and eject him by suit: *Jackson v. Camp*, 1 Cow. 605; *Jackson v. Miller*, 7 Id. 751.

The first charge asked by the defendant was, in our opinion, correctly refused. This was, that the default of Seabury in the non-payment of the purchase money did not rescind the contract between him and Kennedy or his grantees, but that in order to effect this it was necessary to have given Seabury notice. In no view that we can take of this case under the proof can we see how Seabury was entitled to notice. He had violated his agreement in the non-payment of the purchase money stipulated, and his duty was, after such default, to pay the money or restore the property to his vendor if he would receive it. The vendee being in default, the vendor has the right to elect whether he will abandon the contract and re-enter upon his premises, or hold the vendee to his agreement, if the contract is such a one as can be enforced by compelling a specific performance; but in neither case has he the right to any notice of the election of the vendor other than what the process would give him when proceedings are commenced. There was no error in refusing to give the charge as asked; and, without affirming the correctness of the charge as modified and given by the court, we simply say there is nothing in it of which the defendant can complain.

The second charge asked, we think, was also properly refused. It assumes that Kennedy, notwithstanding the default of Seabury, and after such default had continued for nine years, had no right to part with his title, after having put Seabury in possession of the land under his agreement. It assumes that one party to an agreement, in which there are mutual stipulations, can wholly neglect those that rest upon him, and yet hold the other party to the faithful observance of his. It assumes, also, that where a landlord conveys by deed the freehold to another, the tenant is absolved from all allegiance to the grantee. To none of these propositions can we assent.

Kennedy, or Kennedy's executors, after the default of Seabury, had the right to consider him their tenant or as a trespasser. His possession was subjected to their title, and was in law their possession. If they conveyed the title to a third party, that party stood in their shoes. This charge was correctly refused, and we see no error in that which was substituted for it by the court, as the latter was but an affirmation of what had been previously given in charge to the jury.

The theory of the third charge asked is correct, as applied to the generality of cases; but owing to the peculiar position of the defendant, it was not applicable to him, and was correctly refused. The mere fact that the plaintiff himself shows, in the course of his proof, an outstanding title, can not vary the case from what it would be if the defendant on his part showed, or offered to show, the same fact. His position does not permit him to take advantage of it, come from what source it may.

The fourth charge asked was, we think, also properly refused. It is difficult to comprehend how the fact that William C. Easton had been the trustee in a deed made by Seabury for the benefit of Wiswall, of these same premises, could operate as an estoppel to Stewart & Easton, so as to prevent them from recovering the property on a title acquired from Kennedy. The deed from Seabury to Easton, trustee, conveyed to Easton such title, and only such title, as Seabury had. If he had any title to pass by the deed, so far from operating as an estoppel to Easton, it would have the opposite effect.

The fifth charge asked, we think, was correctly refused also; because, under the proof before the jury, and the charges of the court previously given, it was not demanded in order to secure the rights of the defendant. The charge, however, as given by the court after such refusal, was all that the defendant would have been entitled to if the state of the evidence had created a

demand for it, in order to prevent an injury from being inflicted upon him by the verdict.

The next matter of exception presented by the record is, that on the trial the name of Susan Kennedy was permitted to remain in the declaration, purporting a sole demise, after the names of William Kitchen and Samuel L. Kitchen had been stricken out. The record shows that the names of the latter were stricken out on the motion of the defendant, and it would be nothing less than the most manifest error that would induce this court to sustain an exception where the matter complained of was brought about by the party himself assigning the error. But we see no reason why the name of Susan Kennedy could not as well stand alone in the declaration as when joined with the other heirs of Samuel Kitchen, deceased: *Adams on Eject.* 210. If there was a recovery upon it, such recovery could only have been for such interest as she had. But there was no error in laying a demise in her name alone. This decision of the court below, however, was a matter within its discretion, and not revisable on error.

The only remaining matter of exception is, that illegal evidence was permitted to go to the jury. This consisted of the declarations of Samuel Kitchen. In the view that we have taken of this case, this evidence becomes entirely irrelevant; and whether the court erred or not in permitting it to go to the jury, we do not now think it necessary to decide. The plaintiffs in offering it were doing what the law did not require of them. Their case was made out without it. It was offered to rebut an outstanding title, when such a defense was not in the power of the defendant to make; and if the court below even had committed an error, we should not have reversed the case for that reason. It would have been an error in no way affecting the rights of the defendant, and he could not be heard in complaint of it.

We find no error in the record, and the judgment of the court below is affirmed.

RIGHT OF VENDOR TO MAINTAIN EJECTMENT AGAINST VENDEE IN POSSESSION under an executory contract for the purchase of land: See *Browning v. Estes*, 49 Am. Dec. 760; *Fears v. Merrill*, 50 Id. 226, and notes thereto referring to other cases.

ESTOPPEL OF VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT TO DENY VENDOR'S TITLE, or to set up an outstanding title: See *Greeno v. Munson*, 31 Am. Dec. 605; *Meadows v. Hopkins*, 33 Id. 140; *Larkin v. Bank of Montgomery*, Id. 324; *Gans v. Renshaw*, 44 Id. 152; *Vick v. Percy*, 45 Id.

303; *Bank of Utica v. Mersereau*, 49 Id. 189; *Lynch v. Baxter*, 51 Id. 735; *Champlin v. Dotson*, 53 Id. 102, and notes referring to other cases.

POSSESSION OF VENDEE UNDER EXECUTORY CONTRACT IS NOT ADVERSE TO VENDOR: *Browning v. Estes*, 49 Am. Dec. 760; and see the cases referred to in the note to that decision.

RIGHT OF VENDEE IN POSSESSION TO COMPENSATION FOR IMPROVEMENTS: See *Herring v. Pollard's Ex'rs*, 40 Am. Dec. 453; *Martin v. Atkinson*, 50 Id. 403, and cases cited in the notes thereto.

RIGHT OF VENDEE IN POSSESSION TO NOTICE TO QUIT or notice of rescission before ejectment by the vendor: See *Fears v. Merrill*, 50 Am. Dec. 226; *Glascock v. Robards*, 55 Id. 108, and notes.

IMMATERIAL ERROR, OR ERROR NOT PREJUDICIAL to any substantial right of the party appealing or bringing writ of error, is no ground for the reversal of a judgment: *Knowles v. Dow*, 55 Am. Dec. 163; *Edgerly v. Emerson*, Id. 207; *Balliet v. Commonwealth*, Id. 581; *Hensley's Adm'rs v. Lytle*, Id. 741; *Kilburn v. Ritchie*, 56 Id. 326, and cases cited in the notes thereto. See also *Emerick v. Tavener*, ante, p. 217.

DANIEL v. MODAWELL.

[22 ALABAMA, 365.]

EXECUTION SALE TO DEPUTY SHERIFF AT UNDERVALUE, after the deputy has forbidden the sale at the instance of the defendant, will be set aside on the application of the execution plaintiff if seasonably made, though such deputy did not make the sale.

SEVERAL YEARS' DELAY OF MOTION TO SET ASIDE EXECUTION SALE by the plaintiff in execution, because the sale was made to a deputy of the sheriff at an undervalue after the deputy had forbidden the sale at the instance of the defendant, will bar relief, where the plaintiff had sufficient knowledge of the facts to put him on inquiry.

MOTION to set aside an execution sale. The facts appear from the opinion.

W. M. Byrd, and Watts, Judge, and Jackson, for the plaintiff in error.

William M. Brooks, contra.

By Court, GOLDTHWAITE, J. This was a motion made by the plaintiff in execution against the purchaser to set aside a sale of land sold by the sheriff.

The case, as presented by the record, shows that, at the sale of the land, in relation to which the motion was made, the purchaser, at the instance of the defendant in execution, forbid the sale; that he then became the purchaser himself at a price greatly below its real value; and that at the time, although the sale was not made by him, he was the acting and recognized deputy of the sheriff. Under these circumstances, if the appli-

cation had been made in time, and was not influenced by the other facts disclosed by the affidavits, which are made part of the record, we entertain no doubt that the sale should have been set aside. For the deputy sheriff to forbid the sale, and then to become the purchaser at an undervalue, is enough to bring it within the principle of the cases adjudicated in this court: *Mobile Cotton Press v. Moore*, 9 Port. 692; *Abercrombie v. Connor*, 10 Ala. 293; *McCollum v. Hubbert*, 13 Id. 291 [48 Am. Dec. 56]; *Lee v. Davis*, 16 Id. 516; *Henderson v. Sublett*, 21 Id. 626; *Lankford v. Jackson*, Id. 650.

But it also appears that the sale was made in 1848, and the application to set it aside was not made until more than four years thereafter; that the purchaser had taken possession, and had sold his interest to third persons for valuable consideration, to one of whom he had executed a deed of conveyance for a portion of the lands, which purchaser had again resold, and the second purchaser, after paying a portion of the purchase money, had gone into possession, and made valuable improvements. It is true that the plaintiff in error alleges, as a reason for failing to make the application at an earlier period, that he was not apprised of the fact that the sale was forbid by the purchaser; but he knew of the sale: he knew who was the purchaser; and as he himself had been the owner of the land, and resided at or near the place where it was situated, he must also have known what the land was worth, and that the price at which it was bid off was greatly under its real value. These circumstances were sufficient to put him on his inquiry; and had he exercised that degree of vigilance which a person of ordinary prudence would have used in relation to his own affairs, as the sale was a public one, he might easily have informed himself of all the particulars which attended it. We do not think that, where the party in interest has neglected for more than four years to avail himself of the ordinary and accessible means of information within his reach, and other interests in the property have sprung up, *Lankford v. Jackson*, *supra*, that he should then be allowed to set aside the sale, at least in this summary way; and, for these reasons, are of the opinion that the motion was properly repudiated.

The judgment is consequently affirmed.

SHERIFF OR DEPUTY PURCHASING AT EXECUTION SALE, EFFECT OF: See *Worland v. Kimberlin*, 44 Am. Dec. 785; *Harrison v. McHenry*, 52 Id. 435, and note.

NOTICE OF FACTS PUTTING PARTY ON INQUIRY: See the note to *Lodge v. Simonton*, 23 Am. Dec. 47, where this subject is discussed. See also *Price v. McDonald*, 54 Id. 657, and cases cited in the note thereto.

SMITH'S EXECUTORS v. WILEY.

[22 ALABAMA, 396.]

ADMINISTRATOR OR GUARDIAN CAN NOT RECEIVE RENTS OF LANDS OUTSIDE STATE in which he is appointed, nor can the probate court authorize him to receive them; and if he does receive them, he does so in his own wrong, and is bound to pay the money to those entitled to it.

TENANT IN COMMON MAY MAINTAIN SEPARATE DISTRESS OR ACTION FOR SHARE OF RENT of the common lands, as a general rule; and where rent is collected by an administrator or guardian in his own wrong, each of several co-heirs entitled thereto may waive the tort and sue in *assumpsit* for his share.

TENANT IN COMMON MAY SUE ALONE FOR CONVERSION of the common property, or if it has been converted into money may waive the tort and sue in *assumpsit* for his share.

WARD MAY SET OFF IN DEBT ON REFUNDING BOND TO GUARDIAN SHARE OF RENT received by such guardian on lands without the state belonging to the ward and others as co-tenants.

DEBT on a refunding bond. The plaintiff had judgment, and the defendant brought error. The opinion states the case.

I. W. Garrott, for the plaintiff in error.

R. H. Smith and John, contra.

By Court, CHILTON, C. J. Wiley brought his action of debt against Joseph W. Smith, in the county court of Perry, which, after the late statute abolishing the civil jurisdiction of that court, was removed into the circuit court of that county, upon a refunding bond given by said Smith to him in 1844, in the penal sum of five thousand dollars, the condition of which recites, "that, whereas the said Thomas H. Wiley, as guardian of the said Joseph W. Smith, has accounted for and paid over to said Smith the sum of seventeen thousand four hundred and eighty-nine dollars and eighty-eight cents (including his account for support and maintenance during his guardianship): Now, if it shall hereafter appear that the sum of seventeen thousand four hundred and eighty-nine dollars and eighty-eight cents is more than the said Joseph W. Smith is entitled to receive of and from the said Wiley, his guardian as aforesaid, from the settlement of his said guardian's accounts, in the orphans' or county court of Perry county, and the said Joseph W. do, in case of

such excess so appearing, immediately repay and refund such excess to said Thomas A. Wiley, then said obligation to be void," etc.

The plaintiff below read said bond in evidence, and then produced a transcript of the record of the final settlement of his guardianship, made on the twenty-fifth day of October, 1845, with the orphans' court of Perry county, by which it appears that he had overpaid the said Joseph W. the sum of one hundred and fifty dollars and fifty-five cents, which was stated by the orphans' court as due to the guardian from the said Smith, who had then arrived to full age, and the said Wiley was thereupon fully discharged as said guardian. The plaintiff here rested his cause.

The defendant then (now the plaintiff in error) offered proof conducing to show that Wiley had become the administrator of Robert Smith, deceased, in 1841; that said Robert died seised and possessed of certain real estate in Monroe county, in the state of Mississippi, and that said Wiley, from December, 1841, to the thirty-first of January, 1846, had collected rents due on account of said real estate in Mississippi, amounting to three thousand three hundred and forty-four dollars and eighty cents, of which sum eight hundred and ninety-seven dollars and fifty cents had been collected by him after the settlement of his accounts as guardian of said Joseph. Defendant further offered to prove that said Wiley, on a settlement with the orphans' court of Perry county of his administration of said Robert Smith, made on the twelfth day of October, 1844, had charged himself with the rents received on account of said land up to that time; but that on a subsequent application to the same court, made on the eighteenth of May, 1847, he obtained a decree in said orphans' court, correcting the error, and giving him credit for said sum so received as rent, and that he had never accounted for the same; that there were four heirs of said Robert Smith, the said Joseph W. Smith being one of them.

This proof was excluded, and the defendant excepted; and the only question before us is, whether the interest or portion to which Joseph W. Smith was entitled, in the rents collected by Wiley, constitutes a good set-off in this action. This resolves itself into another question, as to whether Joseph W. Smith could have brought a separate action of debt or *indebitatus assumpsit*, or whether he must unite with the other heirs of Robert Smith in an action to recover. If he could have sued for his proportion of the sum received by Wiley, without join-

ing the other heirs, then it is clear the proof was improperly rejected, as in that event the sum due would constitute a valid set-off.

It is conceded that the heirs of Robert Smith were entitled to the rent of the Mississippi lands, and that such rents constituted no part of the assets of his estate was decided by this court in *Smith v. Smith*, 13 Ala. 329. Neither could the orphans' court of this state confer upon the administrator of Smith the authority to receive them. It follows, therefore, that the rents of the Mississippi lands were not received by Wiley as administrator.

Neither do we think the orphans' court of Perry county could have conferred on Wiley, as guardian for one or all of the heirs, the authority to rent the land situated without the limits of this state; for we see no difference, in principle, between an administrator and guardian, so far as respects the extraterritorial powers of the court. As, therefore, he could not have been vested with a rightful authority to lease the land and receive the rents in Mississippi, it follows that Wiley received them in his own wrong: *Smith v. Smith*, *supra*; *Williamson v. Branch Bank*, 7 Id. 906 [42 Am. Dec. 617]; *Julian v. Reynolds*, 8 Id. 680; Story's Conf. L. 414.

Having received the money in his own wrong, the law implies an undertaking on his part to pay it to the persons who in justice and equity are entitled to it. By receiving rent for the land from the person to whom he had leased it without authority, Wiley occupies no better condition, in respect to such rent, than the tenant himself; and as the tenant was a wrong-doer, and liable separately, as we shall presently see, to each of the owners of the land, who were tenants in common, for his share, so Wiley, who has taken his place as respects the payment of the rent, can not complain that he has subjected himself to the separate actions of the respective tenants in common.

As a general rule, tenants in common of land are entitled to the rent, each for his share, so that each may take a separate distress or maintain a separate action: 3 Bouv. Inst. 137. Judge Kent, in the fourth volume of his commentaries, says: "If tenants in common join in a lease, it is, in judgment of law, the distinct lease of each of them; for they are separately seised, and there is no privity of estate between them. They may enfeoff and convey to each other, the same as if they dealt with a stranger. They are deemed to be seised *per my*, but not *per tout*; and consequently they must sue separately in

actions which savor of the realty, but they join in actions relating to some entire and indivisible thing, and in actions of trespass relating to the possession, and in debt for rent, though not in an avowry for rent:" 4 Kent's Com. 368.

We can not well understand how the joining in a lease by several tenants in common leaves the lease in judgment of law the distinct lease of each, and yet that one of them should be able to release the rent due upon such lease to the others; nor how it is, in legal contemplation, the lease of each of the lessors, and yet that each should not be entitled to his action upon it. Such, however, is clearly the doctrine asserted by Judge Kent and by the supreme court of New York.

In *Austin v. Hall*, 13 Johns. 286 [7 Am. Dec. 376], two of several heirs executed a release to the defendant, of all claim to damages for a trespass upon land descended to the heirs from their father, which release was in consideration of six cents. Held, in an action of trespass *quare clausum fregit*, for a trespass on the land and an eviction of the plaintiffs, the release was a bar to the action, as they were all bound to join, and the release constituting a good bar as to the tenants in common who released, was a complete defense as to all. The same doctrine was afterwards affirmed by that court in *Decker v. Livingston*, 15 Id. 479, and *Hill v. Gibbs*, 5 Hill, 56; in which latter case, it is conceded that the English cases say tenants in common may join, while the New York cases hold they must.

According to the rule established by the English adjudications, if the lessors be joint tenants, all must join in the distress for rent: *Pullen v. Palmer*, 5 Mod. 73; but one of several joint tenants might distrain in the name of all: *Robinson v. Hoffman*, 4 Bing. 562; S. C., 13 Eng. Com. L. 637. So likewise of parceners, who were considered in law as constituting but one heir: *Stedman v. Page*, 5 Mod. 141; S. C., *sub nom.* *Stedman v. Bates*, 1 Ld. Raym. 64. But it is said "tenants in common, as they have several title, may distrain severally, each for his own share of the rent:" Archbold's Land. & Ten. 110; citing *Whitley v. Roberts*, McCle. & Yo. 107; *Willis v. Fletcher*, Cro. Eliz. 530; and that one may distrain likewise in the name of all, if not forbidden by the others to do so, and may afterwards in replevin avow as to his own moiety, and make cognizance as bailiff for his co-tenants as to their proportion of the rent: Archbold's Land. & Ten. 110; *Culley v. Spearman*, 2 H. Black. 386. Where a person holding under two tenants in common paid all the rent to one, after notice by the other not to pay his moi-

ety to any but himself, it was held by the court that the latter, notwithstanding such payment, might distrain upon the tenant for his share of the rent: *Harrison v. Barnby*, 5 T. R. 246.

It seems to be further the well-settled rule, that if tenants in common join in making a lease, the instrument does not operate as a joint demise of the whole, and can not be pleaded as such: *Heatherley v. Weston*, 2 Wils. 232; *Mantle v. Wollington*, Cro. Jac. 166; *Harcourt v. Fox*, Comb. 213; Archbold's Land. & Ten. 10; *Doe v. Errington*, 1 Ad. & El. 750; but as to A.'s moiety, it is the lease of A. and the confirmation of B.; and as to B.'s moiety, it is the lease of B. and the confirmation of A.: Roll. Abr. 877. Mr. Crabb, in his work on real property, holds the same doctrine. He says: "Tenants in common can not properly join in making leases; but if two tenants in common join in making leases for years, this shall be the lease of each for his own part, and the confirmation of the other:" Sec. 2318 a. He further says, that "although joint tenants must sue and be sued jointly, yet it is otherwise with tenants in common, for they are of several titles, and the freehold is several:" Id.; 2 Went. on Executors, 214; *Fursden v. Moor*, Carth. 224. This rule is subject, however, to this qualification, that where the thing sued for is in its nature entire, and incapable of being severed, then, from the necessity of the case, they are permitted to join: Lit., sec. 314; 1 Inst. 197 a; Crabb's Real Prop., sec. 2318 a.

Mr. Chitty, in his treatise on pleadings, says: "If tenants in common (who hold by distinct titles) jointly demise premises, reserving an entire rent, they may, and perhaps should, join in an action to recover it. If the rents be secured to them separately, in distinct parts, they must sue separately; for in such case, as well their estate or interest as the terms of the contract are distinct and divisible, and where there have been separate demises by tenants in common of their interest, or where tenants in common by conveyance become purchasers or landlords, they must sever in action for rent or double damage," etc.: 1 Ch. Pl. 12. See also Broom on Actions, 28; 56 Law Lib. 46.

In this state, it appears to be well settled that where property belonging to tenants in common is converted by one of them, or is sold by the sheriff or other person as the property of one of them, so as to amount to a conversion as respects the right of the other owner or owners, an action of trover lies, at the suit of such owner, to recover for the conversion; or, if the property has been sold for cash, the tort may be waived, and *indebitatus*

assumpsit may be maintained by the other owner for his proportion of the fund: *Perminter v. Kelly*, 18 Ala. 716 [54 Am. Dec. 177]; *Smyth v. Tankersley*, 20 Id. 212 [56 Am. Dec. 193]; and in *Price v. Pickett*, 21 Id. 741, we held that tenants in common may sue jointly in *assumpsit* for money had and received to recover the rent; but we are not apprised of any decision of this court which holds that in the absence of a contract which fixes upon an entire rent to be paid to them jointly they are compelled so to join.

We do not wish to go beyond the case made by the facts before us. Here there was no contract of lease by the tenants. Wiley, without authority, leases the land, and receives the rent, as we have said, in his own wrong. Each party has a right to waive his want of authority, confirm his act, and treat him, to the extent of his share of the rent, as holding money which, in justice and equity, he should pay over to him. We can not subscribe to the doctrine that either one of the four heirs of Robert Smith could have given Wiley a release for the whole. The case of *Harrison v. Barnby*, 5 T. R. 246, is, in our opinion, opposed to such a view; yet this would be the result if all must necessarily join in an action to recover. We think the law implies an undertaking on Wiley's part to pay each his share; and as he volunteers to receive the money for each, he can not complain that the law casts on him the duty of apportioning the funds, or subjects him, on his failure, to the suit of each party for his several portion of it. We have fully considered the cases cited by the counsel for the defendant in error, which seem to favor a different conclusion; but we are not disposed to follow them, as we think they can not be supported on principle, and are opposed by the better English authorities, some of which we have cited.

As, therefore, the said Joseph W. Smith, after he arrived at age, had the right to confirm the act of Wiley, and elected to treat him as holding the proceeds of the rent of the land for him to the extent of his interest, and as he could have maintained *indebitatus assumpsit* for his share, we see no reason why it may not be set off in this action as a mutual debt between the parties. This fund was received by Wiley without the pale of his guardianship; and now that the relation of guardian and ward has long since ceased, and having by his election, as indicated by his plea of set-off, chosen to treat Wiley as his debtor, we see no substantial reason for sending the party into a court of equity, or for an account between them, as between guardian and ward,

as indicated by the case of *Sherman v. Ballou*, 8 Cow. 304. This account has already been taken by the orphans' court, and the guardian has been discharged; and as his indebtedness, by reason of his receipt of these rents, depended upon the election of the said Joseph W. Smith to treat him as his debtor, which, as we before said, has occurred since his settlement as guardian, no valid reason exists why he should not be proceeded against for money had and received: *Monypenny v. Bristow*, 2 Russ. & M. 117; *Price v. Pickett*, 21 Ala. 741.

Our conclusion is, that the proof rejected by the court tended to establish a valid set-off.

The judgment must therefore be reversed, and the cause remanded.

AUTHORITY OF ADMINISTRATOR, EXECUTOR, OR CURATOR OVER ASSETS IN ANOTHER JURISDICTION: See *Cutter v. Davenport*, 11 Am. Dec. 149; *Glenn v. Smith*, 20 Id. 452; *Vaughn v. Barret*, 26 Id. 306; *Schneller v. Vance*, 28 Id. 140; *Fletcher v. Sanders*, 32 Id. 96; *Governor v. Williams*, 38 Id. 712; *Vroom v. Van Horne*, 42 Id. 94; *Davis v. Smith*, 48 Id. 279, and other cases and notes in this series cited in the notes thereto. See also *Judy v. Kelley*, 50 Id. 455.

RIGHT OF ONE CO-TENANT TO SUE ALONE FOR CONVERSION of or injury to the common property by a stranger: See *Longfellow v. Quimby*, 48 Am. Dec. 525; *Harker v. Dement*, 52 Id. 670; *Agnew v. Johnson*, 55 Id. 565; *Smyth v. Tankersley*, 56 Id. 193, and other cases in this series cited in the notes thereto.

RIGHT OF CO-TENANT TO SUE ALONE FOR HIS SHARE OF RENT OF COMMON PROPERTY: See *Lahy v. Holland*, 50 Am. Dec. 705.

RIGHT TO WAIVE TORT AND SUE IN ASSUMPSIT FOR CONVERSION: See the note to *Webster v. Drinkwater*, 17 Am. Dec. 242, and the note to *Wells v. Brigham*, 52 Id. 753. See also *Osborn v. Bell*, 49 Id. 275; *Stearns v. Dillingham*, 54 Id. 88; *Smyth v. Tankersley*, 56 Id. 193, and the notes thereto.

GILBERT v. GILBERT.

[22 ALABAMA, 529.]

PROPONENT OF WILL, WHETHER EXECUTOR OR NOT, IS INCOMPETENT WITNESS to support it, being liable for costs.

DECLARATIONS ACCOMPANYING ACT INADMISSIBLE IN EVIDENCE ARE INADMISSIBLE as part of the *res gestæ*.

DECLARATIONS OF COMPETENT WITNESS are inadmissible except when part of the *res gestæ*.

UNDUE INFLUENCE TO INVALIDATE WILL MUST DESTROY FREE AGENCY of the testator, in a measure amounting to moral coercion preventing the exercise of due testamentary discretion, and solicitations, arguments, and persuasions of affection, though they may sway his mind, are not enough.

TESTATOR'S ACTS AND DECLARATIONS BEFORE AND AT MAKING OF WILL, showing friendly or affectionate feelings for a son or other relative excluded therefrom, are competent evidence on the question of undue influence.

ACTS OF OFFICIOUS INTERMEDDLING WITH TESTATOR tending to harass him, and showing a purpose to hurry him into the execution of his will without deliberation, are evidence of undue influence.

TESTIMONY OF RELATIVES OF TESTATOR THAT THEY NEVER HEARD OF WILL until a short time before offer for probate, though they lived near the testator, is incompetent on the question of undue influence.

REFUSAL TO ADMIT FURTHER EVIDENCE AFTER CLOSE OF TESTIMONY is discretionary and not revisable, though the testimony was in itself competent.

ERROR to reverse a judgment of the probate court on an issue of *devisavit vel non* against the validity of a nuncupative will. The proponent, plaintiff in error, was executor of the will. The contestant was the testator's minor son, who was excluded from the will. The ground of contest was alleged undue influence by the testator's mother. The proponent offered himself as witness for the will, but was excluded, though he offered to renounce the executorship. Certain declarations made by the contestant while leaving home a few days before his father's death, going to show that he had been ordered to leave by his grandmother, and also certain declarations of the grandmother to the same effect, were admitted against the proponent's objections. Evidence of sundry declarations of the testator showing affection for the contestant, and of certain alleged acts of intermeddling by the testator's mother, was also admitted against objection. The testimony of two relatives of the deceased, that they lived near him but never heard of his making a will until shortly before the offer of probate, was likewise admitted, notwithstanding the proponent's objection. The court refused also to allow the proponent to prove certain declarations of the contestant's grandmother that she had no ill feeling against him. This evidence was offered after the evidence was closed.

James O. Williams, for the plaintiff in error.

R. H. Smith, contra.

By Court, **GOLDTHWAITE, J.** The ruling of the court below in refusing to allow the plaintiff in error to become a witness to sustain the validity of the will was correct. He was incompetent, not because he was named as executor, but for the reason that he was the proponent of the will. He offered it for probate, and in the contest which arose in relation to its validity, occupied the position of the plaintiff in the suit. If the issue

was determined against him, under the operation of the statute, Clay's Dig. 316, sec. 26, he was responsible for costs. His renouncing as executor could have had no effect in exonerating him from this liability, for the reason that he would still have remained the proponent, and the liability for costs attached to him in that capacity.

The declarations of the son at the time he was met by the testator in the road, going from the house of his grandmother, were, however, improperly admitted, as the act which the declarations were offered to explain would not itself have been evidence; and this testimony derived no support whatever from the subsequent declarations of the grandmother in relation to the same matter. She was a competent witness, and her declarations to explain a previous act could not, under any circumstances, have been received, unless so immediately succeeding it as to become part of the *res gestæ*.

To determine correctly the questions which arise upon the admissions of the other portions of the evidence which were received against the objections of the proponent, it may be necessary to consider the character of the issue which the testimony was offered to support. The question was, whether the will was obtained by undue influence; and undue influence, legally speaking, must be such as, in some measure, destroys the free agency of the testator; it must be sufficient to prevent the exercise of that discretion which the law requires in relation to every testamentary disposition. It is not enough that the testator is dissuaded by solicitations or argument from disposing of his property as he had previously intended; he may yield to the persuasions of affection or attachment, and allow their sway to be exerted over his mind; and in neither of these cases would the law regard the influence as undue. To amount to this, it must be equivalent to moral coercion—it must constrain its subject to do what is against his will, but which from fear, the desire of peace, or some other feeling, he is unable to resist; and when this is so, the act which is the result of that influence is vitiated: *Small v. Small*, 4 Greenl. 220 [16 Am. Dec. 253]; *Mountain v. Bennet*, 1 Cox C. C. 355; *Woodward v. James*, 3 Strobb. L. 552 [51 Am. Dec. 649]; *Polts v. House*, 6 Ga. 324 [50 Am. Dec. 329]; *Kinleside v. Harrison*, 2 Phill. 449. It will be readily seen that, in order to determine whether the will is the result of influence of this character, great latitude must necessarily be given to the evidence. The fact that the will makes an unnatural disposition of the property, the physical and

mental condition of the testator at the time the influence is exerted, the relative position of the testator, and the person exerting it to each other, and the motives of the latter, as deducible from interest to himself, or from affection or animosity to others, may all be circumstances proper to be taken into consideration in the determination of this issue.

Applying these principles to the other portions of the evidence which were excepted to, we have but little difficulty in arriving at a correct conclusion. The declarations of the testator made before the will, in favor of the contestant, were competent: *Smith v. Fenner*, 1 Gal. 170; *Roberts v. Trawick*, 13 Ala. 68; and upon the same principle, the acts and declarations of the testator before the will, and his expressions at the time of its execution, tending to show a father's feeling and affection towards a child for whom the will made no provision. All evidence of this character was legitimate, and was correctly admitted. So, also, acts of officious intermeddling, harassing, and annoying to a dying man, or evincing a purpose to hurry him on to the act, without giving him time to deliberate. While on the other hand, testimony showing that two of the relatives of the decedent, who lived and were acquainted in the neighborhood, had not heard of the will until a short time before the same was offered for probate could not properly be taken into consideration, either as tending to show that undue influence had been exerted, or that no such will was in fact made. This evidence, therefore, should not have been received.

The refusal of the court to hear the evidence in relation to the declarations of the grandmother of the contestant was in all respects proper. As we have already said, she was a competent witness, and her own declarations as to her feelings towards the contestant, not in any way forming part of the *res gestæ*, should not have been received. If, however, the testimony had been legal, as it appears from the bill of exceptions that the evidence on both sides had closed, its admission would have been purely a matter of discretion in the court below, and not revisable here.

For the errors we have referred to, the judgment is reversed, and the cause remanded.

DECLARATIONS OF COMPETENT WITNESS INADMISSIBLE AS EVIDENCE: *Whiteford v. Burckmyer*, 39 Am. Dec. 640, and cases cited in note.

UNDUE INFLUENCE INVALIDATING WILL, WHAT CONSTITUTES, and evidence of: See *Small v. Small*, 16 Am. Dec. 253, and note discussing this subject. See also *Floyd v. Floyd*, 49 Id. 628; *Potts v. House*, 50 Id. 329; *Trumbull v.*

Gibbons, 51 Id. 253; *Woodward v. James*, Id. 649, and cases cited in the notes thereto. The principal case is cited with approval on this point in *Taylor v. Kelly*, 31 Ala. 70; *Van Kleeck v. Phipps*, 4 Redf. 125; *Jackson v. Will*, 26 Wis. 113.

DECLARATIONS OF TESTATOR TO IMPEACH OR INVALIDATE WILL, admissibility of: See *Roberts v. Trawick*, 52 Am. Dec. 164, and note discussing this subject. See also *Hoge v. Hoge*, 26 Id. 52, and other cases in this series cited in the note thereto.

FAVERS v. GLASS.

[22 ALABAMA, 621.]

WORD IN STATUTE HAVING TWO SIGNIFICATIONS should ordinarily be construed as generally understood in the community, but not where it would contravene the manifest intention of the legislature.

STATUTE EXEMPTING PROPERTY FROM EXECUTION SHOULD BE LIBERALLY construed.

“CART” ORDINARILY MEANS TWO-WHEELED VEHICLE, but in a statute exempting debtor’s property from execution, the word will be construed to include a four-wheeled vehicle.

ERROR to reverse a judgment for the plaintiff in an action of trespass. The opinion states the case.

P. T. Sayre, for the plaintiff in error.

E. C. Bullock, contra.

By Court, CHILTON, C. J. Trespass and recovery in the court below by Glass against Favers, for that the latter, as constable, seized and sold a vehicle with four wheels, which was drawn with oxen and called an ox-wagon, the only vehicle the defendant in error had, and which, being the head of a family, he claimed to be exempt from seizure under legal process by the law which says “one horse or ox cart” shall be so exempt: Clay’s Dig. 210, sec. 47.

The only question before us is, whether the term “horse or ox cart” will embrace a wagon, or vehicle with four wheels. The counsel for the plaintiff in error says their meaning is very different, as they are ordinarily understood in the community; that by “cart” is understood a two-wheel carriage, as distinguished from a wagon, which has four; and that we should give to the words employed in the statute their ordinary signification. He insists that the legislature must have known of this distinction, and have passed the law with reference to two classes of vehicles.

True, the word “cart” in its primary and ordinary accepta-

tion signifies a carriage with two wheels; yet it has a more extended signification, and means a carriage in general.

In order to ascertain whether the legislature used it in its restricted or enlarged sense, we must look to the design and object of the statute. This evidently was to secure "to each poor family," in the language of the counsel for defendant, "some vehicle to be used in hauling their crops, and otherwise subserving their wants." The number of wheels upon which it moved we can not suppose was a matter of any moment in the enactment of the law.

When a word used in a statute has two significations, and we are called upon to construe it, ordinarily it should receive that meaning which is generally given to it in the community; but if by giving to it such meaning we should contravene the manifest intention of the legislature, we must then depart from the rule, and give effect to the intention.

We have several times decided that this act must receive a liberal construction: *Watson v. Simpson*, 5 Ala. 233; *Noland v. Wickham*, 9 Id. 169 [44 Am. Dec. 435]; *Sallee v. Waters*, 17 Id. 482. Giving it this construction, we are bound, we think, to hold that a four-wheel vehicle, suited to the ordinary purposes of husbandry, drawn by oxen, and employed in the same uses to which carts, in the common acceptation of the term, are appropriated, is protected by the statute from levy and sale. This would not exempt pleasure-carriages, nor those larger wagons drawn by horses, or even oxen, and employed solely in the carrying trade; but such carts or wagons only were within the contemplation of the legislature as were suitable to be employed about the domestic establishment in garnering crops, hauling wood, rails, and the like. This construction does no violence to the meaning of the word "cart," but adopts its general, rather than its primary, as well as ordinary, meaning for the purpose of giving effect to the plain object and intention of the legislature, excluding from the class implied by the general designation such vehicles as were not within the legislative contemplation.

The judgment must be affirmed.

WORDS IN STATUTES, HOW CONSTRUED GENERALLY: See *State v. Baltimore etc. R. R. Co.*, 38 Am. Dec. 317; *Buckner v. Real Estate Bank*, 41 Id. 105, and cases cited in the notes thereto.

EXEMPTION STATUTES LIBERALLY CONSTRUED: See the note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 252, discussing this subject.

"CART," HOW CONSTRUED IN EXEMPTION STATUTE: See the note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 255.

DONLEY v. CAMP.

[22 ALABAMA, 659.]

INDORSEMENT OF NOTE BEFORE MATURITY IS ABSOLUTE GUARANTY which runs as follows: "I assign and guarantee the within note to J. C. for value received."

GUARANTOR OF NOTE IS NOT ENTITLED TO NOTICE OF NON-PAYMENT, but is liable immediately upon non-payment at maturity.

ALLEGATION OF MAKER'S INSOLVENCY IN ACTION AGAINST GUARANTOR of a note is surplusage, and evidence on that point is superfluous.

GUARANTY INDORSED ON NOTE AFFIRMS ITS GENUINENESS and that of prior indorsements.

EXECUTION OF WRITTEN GUARANTY CAN BE PUT IN ISSUE only by an appropriate plea.

ERRONEOUS ADMISSION OF EVIDENCE UNNECESSARY to make out the case of the party offering it is no ground of reversal.

ERRONEOUS INSTRUCTION IN FAVOR OF PARTY ENTITLED TO RECOVER as matter of law upon the pleadings and evidence is no ground of reversal.

ASSUMPSIT against the defendant as guarantor of a note. The declaration contained the common counts and two special counts. Demurrers to the several counts overruled. Plea, the general issue, and verdict and judgment for the plaintiff, and the defendant brought error. The case sufficiently appears from the opinion.

White and Parsons, for the plaintiff in error.

Rice and Morgan, contra.

By Court, GOLDTHWAITE, J. The cases all show that the contract which is described in the declaration was not within the statute (Clay's Dig. 383) defining the liability of indorsers: *Grannis v. Miller*, 1 Ala. 471; *Jordan v. Garnett*, 3 Id. 610; *Douthitt v. Hudson*, 4 Id. 110; *Nesbit v. Bradford*, 6 Id. 746. If it was a case simply of imperfect or irregular indorsement under our decisions, there would be no difficulty, as then the principles of *Milton v. De Yampert*, 3 Id. 648, would apply; and the diligence necessary to charge the party upon an indorsement of that character would be ascertained from the analogies of the rules applicable to perfect indorsements. But the contract in this case is something more than an indorsement; and in order to ascertain with accuracy what rules are applicable to it, we must first determine what the legal effect of the contract is. Its terms are as follows: "I assign and guarantee the within note to Joseph Camp for value received;" and it was executed by the plaintiff in error before the maturity of the note on which it was written. This note was a specific existing demand; and it was, we think,

the obvious intention of the party to transfer it, and to guarantee the performance of the contract which he thus transferred. The performance of the contract was the payment of the note, according to its terms; and if this payment was not made on the day on which the note became due, the maker did not do what the guarantor had stipulated he should do; and the guarantor then became liable upon his contract, unless something else was necessary to be done to perfect his liability.

We are aware that the construction we have given to the guaranty in the case under consideration is irreconcilable with the decision of this court in the case of *Douthill v. Hudson, supra*, in which case the guaranty was made upon a note before it was due, and was, in its legal effect, identical with the one declared on in the present case. It was there held that the contract was, in law, a promise to pay if the maker was unable to do so; and Chief Justice Collier, who delivered the opinion of the court, rests the decision upon the case of *Grannis v. Miller, supra*. But in that case, the guaranty was made after the maturity of the note; and an examination of the opinion will show that some stress was laid upon that fact, in determining that the contract was not a mere promise to pay the debt presently, without condition or qualification. Indeed, we have found no case, except the one referred to, which goes to the length of holding that an absolute, unconditional guaranty of the payment of a debt or note before it became due was a guaranty simply of the ability of the original debtor to pay.

Regarding the contract as a guaranty for the payment of the debt at maturity, does the failure of the debtor to pay according to his promise perfect the liability of the guarantor? In England the rule is well settled that the guarantor, even of commercial paper, is entitled to notice only when the failure to give such notice has resulted to his loss or injury: *Philips v. Astling*, 2 Taunt. 206; *Warrington v. Furber*, 8 East, 242; but the rule there has never, that we are aware, been extended beyond collateral engagements, upon or in relation to commercial paper; and no English authority, it is believed, has ever held that where the guaranty was of a specific, existing demand, other than mercantile paper, notice was required to the guarantor; on the contrary, this idea is repudiated in the case of *Murray v. King*, 5 Barn. & Ald. 165, which was a guaranty in the shape of a bond, and the court say: "It is insisted, however, that we are to ingraft upon this bond those limitations which the law imposes upon holders of bills of exchange, namely, a due pre-

sentment and notice of dishonor." In the United States the cases are somewhat contradictory; some of them holding that the guarantor of a promissory note is entitled to notice of non-payment by the maker, unless the maker was insolvent at the time the note became due, and that the declaration must aver it: *Lewis v. Brewster*, 2 McLean, 21; *Foote v. Brown*, Id. 369; *Greene v. Dodge*, 2 Ohio, 430; and Judge Story, after an elaborate review of some of the leading American cases, holds the doctrine that where the language of the contract is that of guaranty, as "I guarantee the payment," etc., that the contract is deemed strictly one of guaranty; and that therefore the party is not to be held liable, unless upon due demand and due notice of dishonor to him, within the reasonable time required in other common cases of guaranty: Story on Prom. Notes, sec. 472. The same doctrine was previously held by the supreme court of Massachusetts in the case of *Oxford Bank v. Haynes*, 8 Pick. 423 [19 Am. Dec. 334]. This doctrine, however, is not sustained by the English books, except in the cases to which we have referred of mercantile paper, and has been directly repudiated by the courts of New York: *Allen v. Rightmere*, 20 Johns. 366 [11 Am. Dec. 288]; *Brown v. Curtiss*, 2 N. Y. 225; *Union Bank v. Coster*, 3 Id. 203 [53 Am. Dec. 280]; *Luqueer v. Prosser*, 1 Hill (N. Y.), 256; and the current of American authorities is in support of the New York rule: *Thrasher v. Ely*, 2 Smed. & M. 139; *Taylor v. Ross*, 3 Yerg. 330; *Norton v. Eastman*, 4 Greenl. 521; *Read v. Cutts*, 7 Id. 191 [22 Am. Dec. 184]; *True v. Harding*, 12 Me. 195; *Foster v. Barney*, 3 Vt. 60. Chancellor Kent also, in his Commentaries, in speaking of commercial guaranties, says: "And in the case of an absolute guaranty of the act of another, as of his promise to pay a debt or perform a special agreement, the doctrine of notice applicable to negotiable paper does not apply. The guarantor must inquire of his principal, or take notice of his default at his peril, unless notice be required by the contract of guaranty:" 3 Kent's Com., 7th ed.

The same principle is distinctly intimated by Mr. Justice Thompson, in *Lee v. Dick*, 10 Pet. 496, where he says: "There are many cases where the guaranty is of a specific existing demand by a promissory note, or other evidence of debt, and such a guaranty is given upon the note itself, or with reference to it, and in recognition of it, when no notice would be necessary." There are many cases of guaranty where we can perceive strong reasons for the necessity of giving notice to the guarantor in order that he may protect himself; but where the guaranty is

absolute in its terms, and for the payment of a definite, specific demand, we are able to perceive no sound reason why notice should be required to be given to the guarantor to perfect his liability; and, as we have shown, the English cases and the current of the American authorities are in opposition to it. The contract of an indorser is to pay upon due diligence; but the engagement of a guarantor, in a case like the present, is absolute: it is to pay the note himself if the maker fails to pay it at maturity; and it is as easy for him to ascertain the fact upon which his liability depends as it is for the holder to give him notice. Our conclusion is, therefore, that the contract was an absolute guaranty on the part of the plaintiff in error, that the note should be paid at maturity, and that if it was not paid the right of action became complete against him without any additional act of the other party; and it follows from these views that there was no necessity for the averments in the declaration as to the insolvency of the maker of the note. They were mere surplusage, not required to be alleged, or if alleged, to be proved. The demurrer, therefore, was correctly overruled.

The same principles apply to the evidence of the insolvency of the maker of the note. No such proof was required to make out the plaintiff's case, and if introduced, it was simply redundant or superfluous testimony, in no way affecting the right to recover.

In relation to the admissions of the note and indorsements without proof, it is only necessary to say, that as the contract was declared on as a writing, its execution could only be put in issue by the appropriate plea: Clay's Dig. 304, sec. 152; which was not done in the present case. The guaranty which was indorsed upon the note was an affirmance that the note itself was genuine; and the first indorsement stands upon the same ground. As to the evidence of insolvency, it was entirely unnecessary to support the plaintiff's case, which was made out without it; and its admission, if erroneous, could have been productive of no possible injury to the defendant.

Neither do the charges which were given present any error which is available in this court. The record shows that the note and guaranty, as described in the declaration, were offered in evidence; and this was all that was necessary to make out the plaintiff's case. The charges were, that in the event that the plaintiff had given the defendant reasonable notice of the failure of the maker of the note to pay, or that if such maker was insolvent at the time the note fell due, and remained so until the

commencement of the action, he was entitled to recover. Conceding that the legal proposition was erroneous, yet there was nothing on which the error could operate. Upon the evidence as disclosed by the record, the court would have been justified in instructing the jury to find for the plaintiff; and this being the case, the charges given could have produced no injury to the defendant.

The judgment is affirmed.

GUARANTOR, INDORSEER OF NOTE DEEMED TO BE, WHEN: See *Riggs v. Waldo*, 56 Am. Dec. 356, and note; *Carroll v. Weld*, Id. 481. The principal case is followed on this point in *Studabaker v. Cody*, 54 Ind. 590.

GUARANTOR'S RIGHT TO NOTICE OF NON-PAYMENT: See *Marberger v. Pott*, 55 Am. Dec. 479; *Riggs v. Waldo*, 56 Id. 356; *Menard v. Scudder*, Id. 610, and cases cited in the notes thereto.

IMMATERIAL ERROR, OR ERROR NOT PREJUDICIAL to any substantial right, no ground of reversal: See *Seabury v. Stewart*, ante, p. 254, and cases cited in the note thereto

WINSTON v. WESTFELDT.

[22 ALABAMA, 760.]

RULE OF LIS PENDENS DOES NOT APPLY TO TRANSFER OF NEGOTIABLE NOTE before maturity pending a suit to condemn the amount to the payment of a prior holder's debts.

NEGOTIABILITY OF NOTE IS NOT DESTROYED BY INJUNCTION against its negotiation.

BONA FIDE INDORSEER OF NOTE BEFORE DUE IS NOT BOUND BY PRIOR DECREE against his indorser subjecting the amount to satisfaction of the debts of a prior holder, and he may recover on the note notwithstanding such decree and payment thereunder after the indorsement.

JUDGMENTS AND DECREES BIND PARTIES AND PRIVIES ONLY, and privity exists only where there is identity of interest.

ASSUMPSIT on a note. The plaintiff sued as indorsee of one Bliss, the payee of the note. Bliss took it as collecting agent of a certain bank in payment of a debt due the bank. The bank failed, and made an assignment to Murdock. Bliss indorsed the note in blank and delivered it to the assignee. Certain creditors of the bank brought a suit in chancery, making the bank, Murdock, Bliss, and Lacy, one of the makers of the note, parties to subject the amount of the notes received by Murdock to the payment of their claims, and an injunction was issued against the transfer of the notes. A decree was rendered in accordance with the prayer of the bill, and Lacy, being indemnified, paid the amount of the note. The plaintiff purchased

after the decree, but of whom did not appear. The court instructed the jury that the plaintiff was entitled to recover. Verdict and judgment accordingly, and the defendant brought error.

Hopkins and Jones, for the plaintiff in error.

P. Phillips, contra.

By Court, GOLDTHWAITE, J. The note sued on, at the time of the purchase by Westfeldt, was the subject of controversy in the chancery court; and the first question is, whether these proceedings operated as notice to him; or in other words, does the doctrine of *lis pendens* apply to negotiable paper? This is entirely a new question with us; and, so far as we can learn, has never been directly decided by any court. The doctrine, as it prevails at this time, seems to have had its origin in the common-law rule which obtained in real actions, where, if the defendant aliened during the pendency of the suit, the judgment in the real action overreached the alienation, and the chancery ordinance of Lord Bacon, which provided "that no decree bindeth any that cometh in *bona fide* by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of court, there regularly the decree bindeth. But if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice:" 2 Lord Bacon's Works, 479.

From the use of the term "conveyance," we think that the framer of this ordinance had in view its application to real property only, and that it was intended simply to operate as an adoption in the court of chancery of the common-law rule which we have referred to; and this idea is supported by Mr. Powell, who, in his work on mortgages, says: "There is no case in which equity has determined the property in goods to be affected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels:" 2 Powell on Mort. 618. Chancellor Kent also, while he admits that the rule is well established, and applies it without hesitation to a sale of bonds and mortgages, as being outside of the ordinary course of traffic, and always understood to be subject to certain equities, *Murray v. Lyburn*, 2 Johns. Ch. 441, 444, expresses a serious doubt whether it applies to money or commercial paper not due, and

some question as to its application to movable personal property—such as horses, cattle, grain, etc. The vice-chancellor, in *Scudder v. Van Amburgh*, 4 Edw. Ch. 29, while he “inclines” to the opinion that the rule applied to personal property, admits that the question is not decided. In our own court, in the case of *Bolling v. Carter*, 9 Ala. 921, the rule was applied to slaves; but the weight of that case as authority is somewhat diminished by the fact that the point was not made, and not alluded to by the court. It is, to say the least, highly improbable that a question of this novel and important character should have passed *sub silentio*, had the attention of the court been directed to it.

The question, though, here is not whether the rule applies to personal property, but whether it holds as to negotiable paper transferred before maturity. Lord Eldon evidently doubted it in *Jervis v. White*, 7 Ves. 413, 414; and from the cautious manner in which he expresses himself in the last paragraph of *Hood v. Aston*, 1 Russ. 412, more than twenty years afterwards, we do not think he had fully resolved this doubt. The leaning of Chancellor Kent was against it, on the ground that the safety of commercial dealing required a limitation of the rule; and it must be acknowledged that there is great force in the reason. Negotiable paper, representing, as it does in almost all civilized nations, a very large proportion of the commercial operations, and serving to a great extent as the representative of money, is justly a favorite of the law, and enjoys immunities and privileges which are extended to no other species of contracts. The tendency of the courts has been to uphold this description of paper, in the hands of the *bona fide* holder, against every species of defense which might exist as between the original parties. The credit and confidence due to it must be impaired if the buyer was required to examine the courts of every county in the state before he could be sure of his purchase; and such would necessarily be the case if the doctrine of *lis pendens* applied to it. There are no adjudications to force us to this extremity; the strongest considerations of public policy seem to forbid the extension of the rule to money or bank bills; and we think that commercial paper, as the representative of money, should stand on the same footing in this respect.

Neither does the fact that an injunction against negotiating the note was in force destroy its negotiability. We do not understand any of the authorities to go to that length; and the same reasons exist to sustain it in the hands of a *bona fide* holder,

as in the case of *lis pendens*. The party, it is true, would be placed by the injunction in a better condition, as the chancellor could commit for the breach until the party who negotiated the note had got it back into his possession, or paid the amount due upon it; but the injunction could not operate to destroy the qualities which the law attaches to the instrument itself.

It is, however, urged on the part of the plaintiff in error, that as Westfeldt sues as the indorsee of Bliss, and the evidence shows that he did not become the holder of the note until after the rendition of the decree against Lacy, he is bound by it, as the privy of Bliss, who was a party defendant to the chancery proceeding. It is true, as a general rule, that a judgment or decree is binding on parties and privies; but technically speaking, there can be no privity where there is not an identity of interest: 1 Greenl. Ev. 523, sec. 190. Usually, as the assignee of a chose in action takes it subject to all the equities, he has precisely the same interest as the assignor; but this is not the case with negotiable paper, taken before maturity, for value, and without notice. The holder, under such circumstances, may have very different rights from the party from whom he received it, and can recover, while his assignor could not. This is the case here. Neither Bliss nor Murdock could recover, because they are not *bona fide* holders, while Westfeldt, upon the evidence, must be regarded as such; and in this respect, his interest is not identical with theirs, and he is not bound by the decree.

Our decision upon these points is conclusive of the case, and renders it unnecessary to consider any of the other questions presented in argument.

The judgment is affirmed.

GIBBONS, J., not sitting.

LIS PENDENS, DOCTRINE OF, DOES NOT APPLY TO NEGOTIABLE PAPER negotiated before maturity; See the note to *Newman v. Chapman*, 14 Am. Dec. 778. As to the applicability of the doctrine to transfers of personalty generally, see the same note; and see also *Cromwell v. Clay*, 25 Id. 165; *Thoms v. Southard*, 26 Id. 467; *Fletcher v. Ferrel*, 35 Id. 143. The foregoing decision is approved on this point in *Junction R. R. Co. v. Cleney*, 13 Ind. 163; *National Bank v. Texas*, 20 Wall. 88; *County of Warren v. Marcy*, 97 U. S. 107; *Durant v. Iowa Co.*, 1 Woolw. 73; *Stone v. Elliott*, 11 Ohio St. 258.

JUDGMENTS AND DECREES BIND ONLY PARTIES AND PRIVIES: *Alexander v. Walter*, 50 Am. Dec. 688; *Vose v. Morton*, Id. 750, and notes.

CARROLL v. STATE.

[23 ALABAMA, 28.]

MERE CIVIL TRESPASS UPON MAN'S HOUSE, unaccompanied by such force as to make it a breach of the peace, is not a sufficient provocation to reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice.

WHERE TRESPASS IS FORCIBLE, OWNER MAY RESIST ENTRY, but he is not justified in killing the trespasser, unless it is necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm.

WHERE PARTY KILLS HIS ASSAILANT when there is not reasonable ground for apprehending imminent danger to his person or property, it is manslaughter; if the killing is accompanied with malice, express or implied, it is murder.

ENTRY INTO MAN'S HOUSE, after a warning not to enter, does not necessarily constitute a forcible trespass.

EVIDENCE OF THREATS OF VIOLENCE made by the deceased against the prisoner is not admissible unless the same was communicated to the prisoner previous to the killing.

VOLUNTARY CONFESSION OF ACCUSED respecting the act he committed, together with the manner in which the same was rendered, is admissible in evidence.

APPEAL from the circuit court of Autauga. The appellant, John Carroll, was indicted for the murder of John Key. The latter, for some time previous to the murder, was living with the accused, engaged in farming on shares. They had some difficulty about the compensation the deceased was to receive, and the accused notified him to leave his place before a given date, notifying him also that if he ever entered his dwelling-house again he would kill him. It was proved that on the evening on which the killing occurred the prisoner took the trunk belonging to the deceased and carried it and some clothing which belonged to him to the gate of the prisoner's premises. Later in the evening a gunshot report was heard at the prisoner's house, and the deceased was found dead in the room into which he had entered five or six feet before he was shot, his head resting on the door-sill, his trunk lying across his body, and his feet towards the place where the prisoner was sitting, with a gun by his side. The state offered evidence tending to show that one of the guards asked the prisoner, while on the way to jail, "If it was to do over again, would he do it?" The prisoner replied, "Yes, sirree, Bob." The prisoner's counsel objected. The objection being overruled, he excepted. The state then asked the witness, "What was the manner of the

prisoner when he made the reply?" The witness answered that "his manner was short." Another exception was taken. The defendant asked the court to instruct the jury that if the defendant killed Key after the latter "had entered the dwelling-house, under a well-grounded and honest belief, created by all the circumstances, that it was necessary for him to kill the deceased to protect his possession of his dwelling-house, then the prisoner could not be convicted of murder in either degree." The court refused to give the charge, and the defendant excepted, and appealed.

Elmore and Yancey, and N. Harris, for the plaintiff.

P. T. Sayre and T. H. Watts, for the state.

By Court, GOLDTHWAITE, J. We will first consider the questions presented by the refusal of the court to give the charge requested. This charge was, in effect, that if the prisoner acted under a well-grounded apprehension, created by all the circumstances, that it was necessary to take the life of the deceased to protect the possession of his own dwelling-house, he could not be convicted of murder in either degree. To ascertain whether this charge asserted a sound legal proposition, as applicable to the evidence, we must first determine the extent and degree of protection which the law affords to the inhabitant of a dwelling-house in maintaining his possession.

Lord Hale says: "If A. fears, upon just grounds, that B. intends to kill him, and is assured that he provides weapons, and lies in wait so to do, yet without an actual assault by B. upon A., or upon his house, to commit that fact, A. may not kill B. by way of prevention; but he must avoid the danger by flight or other means; for a bare fear, though upon a just cause, gives not a man power to take away the life of another, but it must be an actual inevitable danger of his own life:" 1 Hale P. C. 51.

Again: "A. is in possession of the house of B. B. endeavors to enter upon him. A. can neither justify the assault or the beating of B., for B. had the right of entry into the house; but if A. be in possession of a house, and B. as a trespasser enter without title upon him, A. may not beat him, but may quietly lay his hands upon him to put him out, and if B. resists and assaults A., then A. may justify the beating of him, as of his own assault. But if A. kills him in defense of his house, it is neither justifiable nor within the principle *se defendendo*, for he entered as a trespasser, and therefore it is, at least, common man-

slaughter;" and he cites *Harcourt's Case* in support of this, who "being in possession of a house, A. endeavored to enter, and shot an arrow at them within the house, and Harcourt from within shot an arrow at those who would have entered, and killed one of the company; which was ruled manslaughter, and not *se defendendo*, because there was no danger to his life from those without:" 1 Hale P. C. 485, 486.

Mr. East, in his *Crown Law*, lays down the same doctrine, almost in the words of Lord Hale, and cites *Cook's Case*, reported in Cro. Car. 537, which was where the sheriff's officer and bailiffs, having civil process against Cook, called to him to open his doors because he had such process; whereupon Cook forbid their entrance; upon which they broke the window, and then came to the door and tried to force it open, breaking off one of the hinges, upon which Cook discharged a musket and killed the officer, and it was held manslaughter: East's *Crown Law*.

Hawkins says: "Neither can a man justify the killing of another in defense of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another who, claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he was forbidden, is guilty of manslaughter:" Hawk. P. C. 83.

It is to be remarked, that every case cited by these authors, in relation to a homicide committed upon an assault of the dwelling-house, was one of actual, positive force, exceeding a mere trespass; and in the case of the trespasser entering without title, while Lord Hale admits that, in case of resistance and assault, the beating of him may be justified, he says that if A. kills him in defense of his house, it is at least common manslaughter, for the reason that it was but a trespass; but we are nowhere told that taking life upon an assault is less culpable, under the same circumstances, than the same act upon an assault of the person. The rule of the common law is, that a man may repel force by force in defense of his person, habitation, or property, against one who manifestly endeavors, by violence or surprise, to commit a known felony, such as rape, robbery, arson, burglary, or the like; and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger: 1 East P. C. 271, 272; Fost. 271. In other cases the law requires the use of every precaution consistent with safety, even to flight itself, before taking life; unless, indeed, the party has the protection of his house,

which excuses him from retreating further: 1 Hale P. C. 484; 1 Russ. on Cr. 545; and this, we think, is the only difference between assaults upon the dwelling and upon the person, but that in all other respects they are governed by the same principles. The law laid down in *Meade's Case*, 1 Lew. C. C. 184, tends very strongly to support the views we have expressed. There, a number of persons who had abused Meade during the day came in the night to his house, singing songs of menace and using violent language, indicating that they had come with no friendly or peaceable intention, and Meade, under the apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Holroyd, J., told the jury "that a civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or in anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass. So if a man with force invades and enters the dwelling of another. But a man is not authorized to fire a pistol on every invasion or intrusion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove him, without having recourse to the last extremity. But the making of an attack upon a man's dwelling, and especially in the night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault; but no words and singing are an assault, nor will they authorize an assault in return." Our conclusion is, that a mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. For trespasses with force it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm. If he kills when there is not a reasonable ground of apprehension of imminent danger to his person or property, it is manslaughter; and if done with malice, express or implied, it is then murder.

The rule as to the extent of protection to the dwelling being ascertained, there is but little difficulty in its application to the facts as stated upon the record. It is conceded most fully, that if the evidence shows an assault upon the house or the person,

under circumstances which would create a reasonable apprehension—that is, a just apprehension in the mind of a reasonable man—of the design to commit a felony with force, or to inflict a personal injury which might result in loss of life or great bodily harm, the danger of the design being carried into execution being imminent and present, the person in whose mind such an apprehension is induced, and over whose person or property such danger is impending, may lawfully act upon appearances and kill the assailant. The law, in such a case, would not require that the danger should be real—that the peril should actually exist; but it does require that the appearances should be such as would excite a reasonable apprehension of such peril; and if such appearances do not exist, the killing would be either murder or manslaughter.

Assuming, therefore, that the deceased came to his death by the act of the prisoner, and by the use of a deadly weapon, and in the aspect of the case as presented by the charge requested, the question is simply whether the act was done under the necessity, real or apparent, which the law requires. If it was not, it follows necessarily that the prisoner was guilty either of murder or manslaughter; and if there was any evidence which tended to show that such necessity existed, the charge requested should have been given. Without referring to the evidence in detail, it is sufficient to observe that the bill of exceptions shows that none was offered of any act of violence on the part of the deceased, either in making the entry into the house, or after it had been made, unless the entry itself, after he had been warned not to enter, might be regarded as an act of violence. When the law speaks of a forcible trespass, it means such a trespass as would amount to a breach of the peace. Entering the house after a warning had been given would have aggravated the trespass; but if done without force, it would not have been a breach of the peace. The whole evidence, therefore, consisted of the previous threats made by the deceased and the trespass committed by him. The threats, however, did not change the character of the trespass, and convert it into a trespass with force. We have seen that, although a forcible trespass upon the dwelling-house may, in some cases, authorize the killing of the assailant, yet it is not every invasion even of this character upon a man's dwelling which will reduce the killing to manslaughter. The charge requested referred solely to the right of the prisoner to protect the possession of his house, and the circumstances, therefore, must tend to prove a reasonable apprehension on his

part of the existence of such a state of facts as would relieve him from the crime of murder. Taken in connection with the evidence, then, the charge asserted the proposition that where the evidence established only a trespass without force, it tended to create a reasonable apprehension, not only that it was committed with force, but under such circumstances as would be sufficient to reduce the killing to manslaughter. We think there was no error in the refusal of this charge.

In relation to the threats of personal violence made by the deceased toward the prisoner, which were excluded, we also think there was no error. The record shows they were not communicated to the prisoner, and we can not therefore regard his action as having been influenced by them. But it is urged these were admissible to show the character of the conduct of the deceased in entering the house after he had been warned not to do so. The utmost that the threats could show in this aspect was, that the deceased entered the house of the prisoner with the intention of inflicting personal violence upon him, but the record does not show that any such violence was offered or attempted; besides, we are not informed as to the precise character of the threats, and it is not every species of personal violence, even when offered against a man in his own house, that will reduce a homicide to the offense of manslaughter when committed with a deadly weapon. Declarations of this character can, in general, only be received when they constitute part of the *res gestæ*, and as they were made a fortnight before the fact to which they were referred, were not admissible on this ground.

The only remaining question is, whether the court erred in its rulings in relation to the testimony of Goree. It is urged, on the part of the prisoner, that the objection to this evidence should have been sustained for the reason that the question asked by the witness assumed his guilt, and was therefore calculated to entrap him. We have found no case which held that a question which assumed the guilt of the prisoner was necessarily calculated to entrap him; and where that is not the case, we can perceive no sound reason for rejecting the evidence upon the ground alone that the question in reply to which the confession was made assumed the guilt of the party charged. The true test, we apprehend, is to ascertain whether the confession was made under circumstances which were calculated to render it untrue; and upon this principle, if it be made under the slightest inducement of hope or fear, excited by one having authority, it can not be received. There may be questions so

artfully put that the party to whom they are directed may, in answering them, not be aware of the effect of his answer; and if admitted, it may be regarded as a confession when it was not intended as such by him; and this we think was the most that was meant by the *dictum* in the case of *Commonwealth v. Mosler*, 4 Pa. St. 264. The case of *State v. Clarissa*, 11 Ala. 57, is not authoritative on this point, as the decision was correct on the ground that the confession was made under the influence of the previous punishment the slave had received. In the case before us we do not think the question was at all calculated to entrap the prisoner, and the objection on that ground is not tenable.

It is, however, insisted that the evidence should have been rejected, for the reason that neither the question nor the answer pointed directly to the commission of the offense. The question, it is true, did not refer in direct terms to the act with which the prisoner was charged; but we think that under the circumstances it could not properly have been referred to any other act. We must presume, in the absence of evidence to the contrary, that the prisoner was possessed of ordinary intelligence, and if he was, the true import of the question addressed to him, after he had been committed for the murder of the deceased by a person in whose custody he was, could not well have been misunderstood. We think it was sufficient to go to the jury, leaving its weight to be determined by them.

Neither do we think the court erred in overruling the objection either to the question or the answer, as to the manner of the prisoner. His answer to the question which preceded the one objected to was of a character which rendered his manner, at the time it was said, very proper to go to the jury for the purpose of determining the degree of weight to which his answer was entitled. If his manner had been that of the jester or buffoon, however unsuitable it would have been to the occasion, it might have diminished the weight that the jury would otherwise have attached to it. In the answer of the witness, we see nothing to object to. It used a term perfectly well understood when applied to an answer, and was no more a conclusion than if he had used the word "quick" or "angry."

There is no error in the record, and the judgment is affirmed.

MURDER, WHAT CONSTITUTES.—The use of a deadly weapon in a trespass upon property is sufficient to constitute the killing a murder: *Roberts v. State*, 55 Am. Dec. 97, and note thereto.

THE PRINCIPAL CASE WAS CITED in *Noles v. State*, 26 Ala. 31, to the point that a mere trespass upon the person and liberty of the slayer, which

created no reasonable belief in his mind that the trespasser would commit any felony or do him any great bodily harm, could not be permitted to constitute an excuse for the person committing the murder.

RAWLS v. DOE EX DEM. KENNEDY.

[23 ALABAMA, 240.]

RETROSPECTIVE LAW IS VALID which does not impair or defeat vested rights. WHERE TWO STATUTES ARE SO INCONSISTENT that they can not stand together, the last repeals the first.

WHERE POSSESSION WAS BEGUN under an act which barred rights of entry after a lapse of twenty years, and that act was afterwards amended so as to bar the right after a lapse of ten years: *held*, that possessions commencing under the old law were governed by the act which first effected a bar in their favor.

WHERE SEPARATE DEMISES ARE LAID from several co-tenants or coparceners, and the statute of limitations has effected a bar against one of the lessors, a recovery may be had on the demises from the others to the extent of their title.

EJECTMENT. Appeal from the circuit court of Mobile. The declaration laid joint and several demises from Oscar Kennedy, Charles S. Shrieve and Mary, his wife, and Ella Walker, heirs at law of Joseph P. Kennedy. The following are the facts: William E. Kennedy, in 1817, being the legal holder of a Spanish claim for lands in Mobile originally granted to Thomas Price, executed his deed to Joseph P. Kennedy for the undivided half of ten acres of this tract. The latter entered into possession, and six years afterwards died, leaving the parties above mentioned as heirs at law. In 1824, Joshua Kennedy purchased from William E. Kennedy his interest in the Price claim, with notice of this deed, and subsequently had the land confirmed to him by act of congress. In 1833 the land was conveyed to William F. Cleaveland and others by deed with warranty. Subsequently the tract was divided into small lots, and John F. Rawls purchased one lot, deriving his title to the same from Cleaveland. The case as above stated was agreed upon by counsel, the parties thereto submitting their right to a recovery either for the whole or a part of the lot above mentioned, reserving their right to appeal. It was also agreed that Mrs. Shrieve and the mother of Ella Walker were minors at the time of their father's death. The court rendered judgment for the plaintiff on the case as above stated, and an appeal was taken.

Stewart, Chandler, and Hamilton, for the plaintiff.

Cuthbert and Sewall, for the defendants.

By Court, GOLDTHWAITE, J. Under the decisions of this court in *Hallett v. Doe*, 7 Ala. 882; *Doe v. Jones*, 11 Id. 63; and *Kennedy v. Kennedy*, 2 Id. 571, Joseph P. Kennedy, by virtue of the deed from William E. Kennedy, obtained title to an undivided half of the premises sued for. This title at his death descended to his heirs at law, who are the lessors of the plaintiff; and the only question really made upon the record is as to the effect of the statute of limitations in divesting the heirs of their title thus acquired.

In this aspect of the case, the first question is, whether the proviso which is found in the first section of the act of 1843, Clay's Dig. 329, sec. 92, applies to the whole act or is to be confined to the section to which it is attached. As the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, we think, upon sound principles of construction, it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter. In the present case, we can perceive no good reason why the limitation of the proviso should be extended to the second section; on the contrary, the effect of such an application would be to give to that section a partially retroactive operation, which, although it is allowed, is not a construction favored by courts. The whole argument of the plaintiff in error upon this point is based upon the use of the word "act" in the proviso; and although this word in its ordinary acceptation would include the entire statute, it is not so definite in its meaning that it may not be applied to a complete and independent section, if found in connection with it. We think it more probable that the word "act" was used as the synonym of "section" than that the proviso was intended to apply to subsequent matter. We do less violence to the usual meaning of the word in the one case than to the objects of the proviso in the other. The case of *Cox v. Davis*, 17 Ala. 714 [52 Am. Dec. 199], supports the view we have taken, and although the decision upon this point may not have the force of an adjudication, we all concur that the correct construction was given to the proviso in that case, and that its application was properly confined to the first section.

The only remaining question is, whether that portion of the statute of limitations, Clay's Dig. 327, sec. 83, is repealed by the statute of 1843, Id. 329, sec. 93.

By the first of these acts it is provided that "no person who has any right or title of entry unto any lands shall make an entry thereon but within twenty years after such right or title has accrued." The second section of the last act limits all actions for the recovery of lands to ten years after the accrual of the cause of action, but contains no repealing clause.

It is unquestionably true, that although the law does not favor the repeal of statutes by implication, yet if the provisions of two statutes are so inconsistent that they can not both stand together, the law repeals the first: *Wyman v. Campbell*, 6 Port. 219 [31 Am. Dec. 677]; *Kinney v. Mallory*, 3 Ala. 626. Are the provisions of the two statutes we are discussing so inconsistent that they can not stand together? We have repeatedly held that the act of 1843 was not retroactive in its operation: *Henry v. Thorpe*, 14 Id. 103; *Doe v. Haskins*, 15 Id. 619 [50 Am. Dec. 154]; *Cox v. Davis*, 17 Id. 714 [52 Am. Dec. 199]; and the correctness of these decisions upon this point is not questioned. The subject, therefore, on which the act of 1843 operates can only be a possession which has continued ten years subsequent to its enactment. On what does the act of 1802 operate? The answer is, Upon a possession of the period it prescribes, and which is not covered by the act of 1843. We say "not covered by the act of 1843," for the reason that when the possession which is required to operate as a bar by that act becomes complete, it is then brought within and of course governed by its provisions; but until then the last act can not operate upon it. If a possession can exist under the first act, separately and independently of that which is required under the last, then, although both acts may relate to the same subject, the matter on which they operate is not the same, and the rule laid down by Judge Collier in *Wyman v. Campbell*, *supra*, applies: "That, although two statutes be seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction as that the latter may not be a repeal of the former by implication."

Upon the application of this rule, it would seem to follow necessarily that the act of 1802 remains in force as to possessions commenced under it until the possession is covered by the act of 1843. This construction results from the prospective operation of the last act, and is in harmony with the general principles of law and the spirit of the English as well as the American decisions: *Wilkins on Lim.* 140-147; *Cochran v. Spillar*, Vern. & S. 468; *Eakin v. Raub*, 12 Serg. & R. 330; *Williamson v.*

Field, 2 Sandf. Ch. 533; and we may also add that it is in conformity with the doctrine of the civil law: Delvincourt, Code Civil, 633; 2 Vazeille, Traité des Prescriptions, arts. 789, 790.

A still stronger argument, however, in support of the conclusion to which we have arrived is to be found in the intention of the legislature, as deducible from the act of 1843. Upon this matter we think there can be no difference of opinion. The statute speaks for itself, and says that the bar arising from adverse possession is to be diminished in one class of real actions to one fourth, in writs of right to one third, and in all other real actions to one half of the time which had previously been required; thus being, in effect, a legislative declaration that the time which was necessary under the old law to effect a bar was too long; and in the face of this declaration, we are called upon to sustain a construction directly the reverse of that which is indicated by the act as the policy of the law—a construction which would, in many instances, have the effect of increasing the time required to complete a bar, and which, in extreme cases, would have the singular effect of adding to the possession the same number of years which the legislature, in effect, declare ought to be taken from it. It would present a singular anomaly, not to say absurdity, in legislation, for the law-maker to declare that the period of possession required to bar an outstanding title was too long, and at the same moment enact a statute which would increase that period. To give to the statute the construction insisted on would not only be in violation of well-settled legal principles, but directly subversive of the will of the legislature, and if adopted must tend materially to impair the confidence of the community in the soundness and practical good sense of legal distinctions.

We have elaborated our views as to the operation of these statutes more than we should have done, for the reason that it has been urged that the question we have discussed is not an open one in this court—that a different construction was given to the act of 1843 in the case of *Henry v. Thorpe*, 14 Ala. 103, and that the construction there given was recognized and affirmed in the later cases of *Doe v. Haskins*, 15 Id. 619 [50 Am. Dec. 154], and *Cox v. Davis*, 17 Id. 716 [52 Am. Dec. 199]. If this be so, and the construction thus given was made under such circumstances as to give to these cases the force of adjudications upon the questions here presented, whatever may be our own views as to their correctness, we should feel bound, from a just regard to the rights of others, who may be supposed to have

acquired titles under them, to adhere to the rule which they have established. The evils arising from a wrong decision, great as they may be, would, in our opinion, weigh but little in comparison with the consequences which might ensue to the community from the establishment of a precedent under which the most solemn adjudications of this court in relation to the titles of real property might be questioned and abrogated. The doctrine of the English courts is to adhere to the authority of adjudged cases, "where they have been so clearly, so often, or so long established as to create a practical rule of property, notwithstanding they may perceive the hardship or not perceive the reasonableness of the rule:" 1 Kent's Com. 478.

"The absurdity of *Lord Lincoln's Case*, Show. P. C. 154," said Lord Mansfield, "is shocking; however, it is now law:" *Doe v. Pott*, 2 Doug. 722. But we must be careful to confine this rule, as to the authority of adjudged cases, to the points actually decided and the true principles of the decision. In every court, if a case varies from the facts and circumstances of preceding authorities, the judge is at liberty to found a new decision on these circumstances: Lord Eldon, 8 Dow. 112; and it has never been asserted that we are aware of by any court, that everything which is said by the judge in delivering his opinion is to be taken as law, or that his argument upon legal questions, not properly arising upon the facts of the case, is to be regarded with the deference due alone to the true principles on which the decision should rest: Best, C. J., in *Richardson v. Mellish*, 2 Bing. 229. With these remarks, we proceed to an examination of the several cases which are relied upon by the defendant in error to sustain the position that the act of 1802 is repealed by the act of 1843.

In *Henry v. Thorpe*, *supra*, which was a writ of right barred in thirty years, under the ninth section of the act of 1802, the action was brought in 1845, and the adverse possession commenced in 1818. Collier, C. J., who delivered the opinion of the court, in stating the question presented, says: "We come now to consider the case with respect to the statute of limitations. The statute of thirty years had not completed a bar in 1845, when the present action was instituted, and the question is, whether that statute, in connection with the act of February, 1843, or the latter in itself, constitutes a bar. It is contended by the defendants that the acts of 1802 and 1843 must operate proportionally, and that as five sixths of the period of limitations prescribed by the former had elapsed before the latter was

enacted, one sixth of the time prescribed by the act of 1843 being added, the bar would be perfect." The judge then proceeds: "We have not been able to find any decision of a court recognizing the common law in which the time elapsed under a repealed statute of limitations has been taken into account, to help out the prescription of the new law, when the period required by the old enactment had not expired previous to its repeal. Such a doctrine is not supported by the civil law. The citations of the counsel for the plaintiff show that civilians do not entirely concur in their opinions on this question; yet the majority of them and the best-reasoned discussions maintain that it is competent to modify the terms of prescription at pleasure, and where the prescription has not been completed when the law was changed, the past shall be effaced, and the substituted law shall determine the time that bars a recovery. It is certainly allowable, and perhaps would be altogether just, that effect should be given to the time past, whenever a change is made in the statute of limitations, so that the term may not be protracted; but if no such provision is made by the new law, we can not perceive by what authority the courts can give to both statutes a proportional operation. The latter, if not an express, will operate as an implied repeal of the former, and thus destroy its effect *in toto*." It is obvious, from the statement of the case, that the question as to the repeal of the act of 1802 by that of 1843 was not presented upon the facts. The possession commenced in 1818; the action was brought in 1845; so that thirty years, the time required under the first act, had not then expired. The bar was not complete until the second act, because it had not then been passed ten years. The only question presented was the one stated in the opinion of the court, which we have quoted. The decision was correct, for the reason that the bar was complete under neither act when the action was commenced. The question as to the repeal of the first statute does not appear to have been made by the counsel, nor did it properly arise upon the record; and the conclusion that such was the case was simply stated by the judge by way of argument, and appears to have been based upon the analogies of what he wrongly conceived to be the doctrine of the civil law in relation to prescriptions: Delvincourt and Vazeille, *supra*. The vice of the opinion is not in the result, but in the course of reasoning by which the result is arrived at. It is evident that this case can not be regarded as an adjudication of the question.

In *Doe v. Haskins*, 15 Ala. 620 [50 Am. Dec. 154], the time of

the commencement of the action does not appear from the statement of the case in the reports; but we have looked into the record, and find that the action was brought in 1847. The defendant relied on possession under a bond for titles executed in 1836, coupled with the payment of the purchase money. His possession not being sufficient under the act of 1802, or under the act of 1843, unless the latter operated retrospectively, the question was simply as to the operation of that act. Collier, C. J., rests the case on *Henry v. Thorpe, supra*. Here, also, the decision was correct; but the question as to the repeal of the act of 1802 was not involved, and the reiteration of a portion of the opinion in the former case does not render it authoritative as a precedent, except as to the point actually decided. The last case, that of *Cox v. Davis*, 17 Ala. 714 [52 Am. Dec. 199], does not present the question at all, and the decision at the most goes no further than to sustain the prospective operation of the act of 1843.

We recur again to the question, Has the point under discussion been adjudicated in either of the three cases which we have examined? We have shown that in neither of them was the point directly presented, nor was its decision incidentally involved, or required to be made in order to reach the point presented. In neither of the cases had the period of possession prescribed by the act of 1802 been consummated. Under such circumstances, we can not regard these adjudications as conclusive of the question presented upon the present record. We must regard it as before us for the first time, and give to the expressions in the opinions relied on only such weight as is properly due to them upon principle and authority.

Upon the fullest consideration of the question, we are satisfied that the doctrine argumentatively asserted in *Henry v. Thorpe, supra*, that a change of the period of prescription, of itself, effaces the time which has passed under the old law, if not sufficient to perfect the title, and that prescriptions commenced under the old law, in all cases in which they were not complete at the time of the change, must be determined by the new law, can not be sustained. We hold that the statute of 1802 is not repealed by the act of 1843, and that prescriptions commenced under the first act are governed by it until they fall within the operation of the last, and the consequence is, the possession of the defendants below for more than twenty years before the commencement of the action furnished a full defense as to Oscar Kennedy.

The result is, that upon the case made by the record, the

plaintiff was entitled to recover, on the separate demises laid in the declaration, from Charles S. Shrieve and Mary, his wife, and Ella Walker, one undivided sixth of the lot described in the consent rule, on each demise; the rule being that where the statute runs against one tenant in common or coparcener, its operation as to him does not affect the co-tenants who are within the saving of the statute, upon separate demises by them: *Roe v. Rowleston*, 2 Taunt. 441; *Doe d. Lewis v. Barksdale*, 2 Brock. 436; *Jackson v. Sample*, 1 Johns. Cas. 231; *Doolittle v. Blakesley*, 4 Day, 265 [4 Am. Dec. 218]; *Sanford v. Button*, Id. 310; *Culler v. Motzer*, 13 Serg. & R. 356 [15 Am. Dec. 604]. The court therefore erred in giving judgment for the whole of said lot, and its judgment must be reversed, and under the rule established in *Edmonds v. Edmonds*, 1 Ala. 401, the cause must be remanded.

RETROSPECTIVE LAW, VALIDITY OF: See *Baughner v. Nelson*, 52 Am. Dec. 694, and note.

CONSTRUCTION OF STATUTE.—A statute should be construed in the manner which best harmonizes it with the constitution: *Bailey v. P. W. & B. R. R. Co.*, 44 Am. Dec. 593.

THE PRINCIPAL CASE WAS CITED in *Pearce v. Bank of Mobile*, 33 Ala. 693, to the effect that a later statute shall not repeal an older one by implication, unless they are so inconsistent that they can not stand together.

TARLETON v. GOLDTHWAITE'S HEIRS.

[23 ALABAMA, 346.]

IF JUDGMENT AT LAW IS REVERSED, it abrogates the whole judgment, and places the parties to the action in a position as if the judgment had never been rendered.

MEMORANDA FROM BOOKS AND WRITTEN DOCUMENTS, when produced in response to a call in the bill, are evidence in the cause, but are not necessarily conclusive evidence of the facts which they tend to establish.

STATUTE OF LIMITATIONS DOES NOT APPLY IN CASES OF DIRECT, EXPRESS TRUST, as between the trustee and his *cestui que trust*, but relief should be sought within a reasonable time.

WHEREVER THERE IS STATUTORY BAR AT LAW, the same period is by analogy, or rather in obedience to the statute, adopted as a bar in equity.

TENANT IN COMMON who obtained a conveyance from his co-tenant for the purpose of mortgaging the entire estate, and bound himself to reconvey one half of the land after the mortgage is raised, but who rents out the premises and collects the rents, becomes, as to these rents and profits, a trustee by implication for his co-tenant.

TENANT IN COMMON RECEIVING RENTS under an implied trust for his co-tenant is chargeable with interest on the amount found in his hands from the time of its receipt.

IN CHANCERY CASES, WHERE DECREE IS VOLUNTARILY EXECUTED by the parties, and the plaintiff receives the money decreed to him, he is not estopped from prosecuting an appeal by reason of such receipt.

APPEAL from the chancery court of Mobile. This bill was filed by George W. Tarleton against the administrator and heirs of Henry Goldthwaite, deceased, seeking a reconveyance of one half of a certain lot in the city of Mobile, and for an account of the rents of the same. The bill alleged that Tarleton and Goldthwaite, in 1837, were tenants in common of the land alluded to, and Tarleton, at the request of Goldthwaite, conveyed the same to him. The conveyance was made in order that Goldthwaite could effect a loan, he wishing to have the entire legal title in himself for the purpose of mortgaging the same in order to effect the loan. By the terms of the conveyance Goldthwaite bound himself to raise all incumbrances created by him on the property, and to reconvey one undivided half of the same to Tarleton whenever the incumbrances were raised. Goldthwaite, after the conveyance had been made, took the entire management of the premises, renting them and collecting the rents. For a time he accounted to Tarleton for the half of the rents, and then ceased. Shortly before the death of Goldthwaite, Tarleton called on him for a settlement. The former promised to comply, but was prevented from doing so by his death. His administrator admitted the interest claimed in the land, but denied the indebtedness for rents, and pleaded the statute of limitations. When the cause was submitted, the chancellor rendered his decree for a reconveyance of one half of the premises, and an accounting for the rents and profits of the same for the six years next preceding the filing of the bill. The plaintiff asked that interest be allowed on the sums collected, and excepted to the plaintiff's recovery being limited to the period prescribed by the chancellor. The exception being overruled, plaintiff appealed.

Hopkins and Jones, for the plaintiff.

Campbell and Chandler, for the defendants.

By Court, GIBBONS, J. A motion is made in the present case to dismiss the appeal, on the ground that the decree of the chancellor has been executed by the defendants, and acquiesced in on the part of the complainant. This motion is predicated on the cases of *Hall v. Hrabrowski*, 9 Ala. 278, and *Bradford v. Bush*,

10 Id. 274. These were cases at law where writs of error had been sued out and prosecuted in this court, and pending the litigation, the plaintiff below had collected his judgment by execution. On the judgment being reversed by this court, a motion founded upon the fact that the judgment below had been coerced by due process of law was made in this court to dismiss the writ of error or stay the certificate of reversal until the plaintiff should restore to the defendant what he had thus coerced from him on a judgment then reversed and held for naught at his own instance. The court entertained the motion in both the cases, and denied the party the right to prosecute his judgment, by enforcing its collection at the same time that he is seeking a reversal of it; and the court intimate, in the latter case, that if a motion had been made to dismiss the writ of error before the case was tried in the supreme court on the facts disclosed on the motion then on trial, such motion would have prevailed.

The same principle was afterwards invoked in the cases of *McCreelis v. Hinkle*, 17 Ala. 459, and in *Knox v. Steele*, 18 Id. 815 [54 Am. Dec. 181]. These were cases originating in the orphans' court; and this court, while it recognizes the correctness of the rule as laid down in the cases of *Hall v. Hrabrowski*, and *Bradford v. Bush*, above referred to, distinguish between those cases and the case presented in *McCreelis v. Hinkle*, *supra*. The principle is said to be peculiarly applicable to judgments at law, but is not necessarily applicable to cases arising in the orphans' or chancery courts. The reason of this distinction we apprehend to be that if a judgment at law is reversed it abrogates the whole judgment. It can not be reversed in part and affirmed in part; whereas in cases from the probate court, and in chancery cases, the judgments or decrees may be reversed in part and affirmed in part. On the reversal of a judgment at law, therefore, the theory of the law is that the parties are placed *in statu quo*, and are to be considered as if the judgment had never been rendered. In the case of *McCreelis v. Hinkle*, *supra*, it is said: "The power thus exercised by the appellate court, to compel the plaintiff to refund the money or dismiss the writ of error, seems to me to be a discretionary one, and may be well exercised when the conduct of a party is vexatious or oppressive, and may ultimately result to the injury of the other; but when the defendant can in no aspect of the case be injured by the plaintiff's receiving the money, and this is paid without compulsion, I see no good reason why we should make an order on the

plaintiff to refund the money, or to submit to a dismissal of his writ." We consider this reasoning applicable to the case before us, and it is, in our opinion, decisive of the question. The defendant's motion to dismiss the appeal, therefore, can not prevail.

The next question, in the order in which we propose to examine the present record, is, whether in the bill, answers, exhibits, and proofs the complainant is entitled to a decree for anything whatever for rents collected by the intestate in his life-time and unaccounted for. It is insisted that, as the complainant's bill charging indebtedness and demanding the account calls upon the defendant Campbell to exhibit the documents, memoranda, papers, and written evidences tending to establish the state of the accounts between the complainant and the said intestate, in the handwriting of the said intestate; and inasmuch as the answers deny such indebtedness, and any liability to account, and these documents produced in response to the call of the complainant become evidence in the cause, and show no liability on the part of the intestate to the complainant, so far as the question of rents is concerned—therefore the complainant is not entitled to an account. It is undoubtedly true, that memoranda from books, and written documents, when produced in response to a call from the complainant by way of discovery, become evidence in the cause; but, like most other evidence offered upon the trial of causes, it is only evidence tending to prove a conclusion, but is not necessarily conclusive to establish the result which it tends to prove. Taking all the evidence upon the question of the liability of the administrator to account, the case stands thus: in favor of the complainant is the charge in the bill of the liability with the allegation that the intestate accounted for the rents up to the first of November, 1838; and proof that the intestate rented the premises in his own name, and received the rents therefor, all the while recognizing the right of complainant to one half of the land. On the other hand, against the indebtedness is—1. The answer of the defendant denying the debt, not from personal knowledge, but from belief merely, founded upon the character of the parties and of their situations during the space of time over which the account claims to run; 2. The fact that there appears upon the books of the intestate the evidence of accounting for the rents up to the first of November, 1838, and no evidence afterwards of any accounting, or liability to account, for said rents on the books or among the papers of said intestate;

8. The mutual receipts of the parties, prepared as if in anticipation of a final settlement, or after a settlement had taken place, but not signed by the parties, and the document relative to the rents of the said premises after the first of November, A. D. 1847.

In thus stating the evidence, the complainant, in our opinion, has the advantage, and the proof tending to show a liability on the part of the administrator to account greatly preponderates over that tending to show a contrary conclusion. The complainant does not call upon the defendant to disclose the evidence of a liability to account. This he charges distinctly in his bill, and proposes to prove; but he charges that the defendant, the administrator, has in his possession the specific *data* by which that account shall be made up, and calls upon him to produce such evidence to the court. The defendant complies, produces the evidence, and when inspected, so far from giving the information which the complainant sought, it tends rather to show no indebtedness at all. But we do not consider this evidence sufficiently weighty to overbalance the proof of the complainant, tending to show a liability to account for rents in the hands of the intestate, and we must decide according to the weight of evidence.

The first error assigned upon the record is, that the court below sustained the plea of the statute of limitations of six years, and limited the complainant's demands to six years next preceding the filing of the bill. The question raised by this assignment is, whether the statute of limitations applies to a trust of the nature and character of the one in question. It is contended, on the part of the complainant, that this is an express trust, created by the act of the parties, and to such a trust the statute of limitations can never be pleaded. This principle is well sustained by authority: Hill on Trustees, 263, 264; Lewin on Trustees, 611. But while this is true, it is equally true that a trust created by implication is subject to the statute of limitations. Says Mr. Lewin, in the work above cited: "It is a well-known rule, that as between *cestui que trust* and trustee, in the case of a direct trust, no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there is no adverse title. It has hence been argued that, as the person into whose hands the estate is followed is also by construction of law a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from establishing his claim;

but the authorities to the contrary are clear and express, and can not leave a doubt."

"It is certainly true," said Sir William Grant, "that no time bars a direct trust; but if it is meant to be asserted that a court of equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only circumstances, where the length of time would render it extremely difficult to ascertain the true state of fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who after long acquiescence comes into a court of equity to seek that relief:" *Beckford v. Wade*, 17 Ves. 97. To the same effect is the language of Lord Redesdale, in the case of *Hovendon v. Annesley*, 2 Sch. & Lef. 633.

The question then arises, whether the claim set up by the complainant for the rents is founded upon an express or an implied trust. As to the land itself, the trust is undoubtedly direct, and was created by the act of the parties; but as to the rents and profits of the land, there is nothing whatever said in the paper which was given by Goldthwaite to the complainant on receiving from him a deed for the one half of the premises. As to these rents, the intestate acquired the character of trustee purely by implication, and as an incident to the express and direct trust created by the parties. Our conclusion, then, is, that the claim set up for rent by the complainant, under the circumstances, is one to which the statute of limitations does apply. On this subject Mr. Lewin remarks: "Wherever there is a statutable bar at law, the same period is by analogy or rather in obedience to the statute adopted as a bar in equity:" Lewin on Trustees, 613. There was, therefore, no error in the decree of the chancellor in limiting the demand of the complainant to six years prior to the filing of the bill, deducting the time elapsing between the death of the intestate and the six months after the grant of letters of administration to the defendant on the estate of the intestate.

The next assignment of error is, that the court refused to charge the defendant with the amount of rents not accounted for. The proof on this subject before the master was, that the contracts for

rent during the period inquired of produced four thousand nine hundred and fifty dollars. Of this sum the defendant acknowledged to have received the sum of two thousand two hundred and forty-eight dollars. The defendant showed the further sum of one thousand two hundred dollars in his hands, in the shape of notes arising from the rent of the said premises. But there yet remained the sum of one thousand three hundred and fifty-one dollars and twenty-two cents, entirely unaccounted for. We apprehend it would not do to say that this portion of the rent contracts was not received by the intestate, because no evidence of it appears upon his books. After the rent contracts are proved, fixing the amount at which the property was rented from year to year, we apprehend the burden of proof is then changed to the defendant to show what was or was not received, if he would avoid a liability to account according to the contracts. In refusing to charge the defendant with the half of this amount of rent entirely unaccounted for, the court below, in our opinion, erred. It is insisted that, as the bill only calls for an account of what rents were received, this item does not fall within the purview of the bill until the proof shows they were in fact received. In our view the proof does show *prima facie* that the portion of the rents represented by this item was received, and that proof consists in showing the contracts for renting as above set forth. That proof is sufficient, *prima facie*, to charge the defendant with the amount, and it rests with him after it is made to show that it was not received, or what part, and for what reason it was not received.

The court, in our opinion, also erred in not charging the defendant in the account with interest on the money actually received by the intestate from the date of such receipt. In the case of *Whitworth v. Hart*, 22 Ala. 343, at the last term of this court, we decided that "interest was but a just compensation for the withholding of the principal, and when the principal is ascertained to be due at a particular period, and remains unpaid without a sufficient excuse, interest follows as an incident." The defendant should, therefore, have been charged with interest on such amount as was found in his hands belonging to the complainant, from the date of the receipt of the several items making the aggregate so found.

For the error above noted, the decree of the chancellor, so far as it militates against the views above expressed, is reversed, and the cause remanded; and so far as the decision of the court

below is in accordance with the views above expressed, the decree is affirmed. It is further ordered that the defendant in error pay the costs of this court.

GOLDTHWAITE, J., not sitting.

REVERSAL OF JUDGMENT, EFFECT OF.—The reversal of a judgment restores parties to their original rights, so far as this can be done without prejudice to third persons: *McJilton v. Love*, 54 Am. Dec. 449, and note referring to other cases in this series.

WHEN MEMORANDA FROM BOOKS ARE CONCLUSIVE EVIDENCE: See *Thompson v. Porter*, 53 Am. Dec. 651.

STATUTE OF LIMITATIONS IN EQUITY.—It is an established rule, that where the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject-matter: *Perkins v. Cartmell*, 42 Am. Dec. 753.

LIABILITY OF CO-TENANT FOR RENTS, ETC.—Co-tenant, in the exclusive possession of land, is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not for what was rendered capable by his labor: *Hancock v. Day*, 36 Am. Dec. 293.

OTIS v. THOM.

[23 ALABAMA, 469.]

TESTIMONY OF WITNESSES WHICH IS MERE MATTER OF OPINION is inadmissible as evidence.

STATEMENT OF WITNESS "that he thought if the steamboat had returned to the assistance of the flat boat when the call for assistance was made the stage could have been saved," is mere matter of opinion, and therefore inadmissible.

STATEMENT OF WITNESS that soon after a collision he heard some one on board of the colliding vessel say in a commanding tone, "Go ahead, and let her sink; it's nothing but a damned flat boat, anyhow," and the vessel went on without rendering any assistance, is admissible in evidence for plaintiff in action against owners of colliding vessel.

AGENT IS INCOMPETENT TO TESTIFY FOR HIS PRINCIPAL unless the latter has released him.

APPEAL from the circuit court of Mobile. This action was brought by Reuben Thom against Otis & Jayne, owners of the steamboat Lowndes, to recover damages for the loss of a stage occasioned by a collision between the steamboat and a ferry flat boat, the stage being on board of the latter. On the trial plaintiff's witness testified: 1. That he had known the ferryman of the flat for fifteen years, and believed him to be an expert and careful ferryman; 2. That after the collision the steamboat stopped her engine, and when about fifty yards from

the flat boat she was called on by those on board of the latter to come to their assistance, and that immediately afterwards some one on board of the steamer said in a loud and commanding tone, "Go ahead, and let her sink; it's nothing but a damned flat boat, anyhow;" 3. That he (the witness) thought if the steamboat had returned to the flat when the call for assistance was made, the stage might have been saved. The defendants objected to the testimony, assigning that the first point was a mere matter of opinion, and that the second and third points were irrelevant. The objections were overruled, and defendants excepted. The plaintiff also introduced a witness, who on his *voir dire* stated that he was in the employment of the plaintiff and had control of the stage; that before putting the stage on the flat boat he asked the ferryman if they could cross the river before the steamer came up. Being answered in the affirmative, the stage was put on the flat boat by the witness. Defendants objected to the competency of the witness, on the ground of interest. The objection being overruled, an exception was noted. An appeal was taken assigning error to the several rulings.

John T. Taylor, for the plaintiffs in error.

William G. Jones, for the defendant.

By Court, GOLDTHWAITE, J. It may be doubtful whether the objection to that portion of the testimony of the witness which gave his opinion as to the ferryman of the flat being expert and careful can be sustained, on the ground that such evidence was matter of opinion merely. It is, however, unnecessary to decide this question, as the record shows that it was also objected to on the ground of irrelevancy, and on this ground the objection should have been sustained. The only issue involved was whether the collision took place through the fault of the steamboat. If this was established, the owners were responsible; and the fact as to whether the ferryman was expert and careful could not, of itself, have created any legitimate inference against the boat, and was for that reason foreign to the issue.

We think also that the court erred in admitting the statement of the witnesses "that they thought, had the steamboat returned to the assistance of the flat when the call for assistance was made, the stage could have been saved." This was mere matter of opinion, and given by the witnesses as such, upon the facts which were stated by them. There was nothing to take it out of the general rule in relation to this kind of testimony, and the objection to it should have been sustained.

The words which were detailed by the witness as having been heard on board of the steamboat, taken in connection with the manner in which they were spoken, the fact that the engine had stopped immediately after the collision, and the fact that the boat went on as soon as the words were spoken, might well authorize the jury to infer that an order was given to the effect which was indicated by the words themselves; and in that aspect they might be received to show that the steamboat, after being apprised of the collision, went on without any effort to render assistance, which is always regarded in the courts of admiralty as a suspicious circumstance: Angell on Carriers, sec. 671; *The Cell*, 3 Hag. Adm. 321.

The only remaining question is as to the competency of the witness Sanders. The action, it is to be remembered, was brought to recover for the loss of the stage while it was under the care and custody of this witness. If a verdict should be had by the plaintiff in the present action, the witness is placed in a state of security against any action which the plaintiff might otherwise bring against him, and for that reason is held incompetent in cases like this without a release: 1 Greenl. Ev., sec. 896, and cases there cited.

The judgment is reversed, and the cause remanded.

GIBBONS, J., not sitting.

OPINIONS OF WITNESSES AS EVIDENCE.—This subject will be found to have been fully discussed in the following cases in this series: *Dickinson v. Barber*, 6 Am. Dec. 58; *Grant v. Thompson*, 10 Id. 119; *Rambler v. Tryon*, Id. 444; *Irish v. Smith*, 11 Id. 648; *McKee v. Nelson*, 15 Id. 384; *Kellogg v. Krauser*, 16 Id. 480; *Simpson v. Feltz*, Id. 602; *Clark v. Fisher*, 19 Id. 402; *State v. Tutt*, 21 Id. 508; *Jefferson v. Cotheal*, 22 Id. 567; *Harbison v. Lemon*, 23 Id. 376; *Dunlap v. Berry*, 39 Id. 413; *Hibbard v. Russell*, 41 Id. 733; *Luning v. State*, 52 Id. 153; *Commonwealth v. Webster*, Id. 711.

COMPETENCY OF WITNESS—INTEREST AS DISQUALIFICATION: See *Stevenson v. Mudgett*, 34 Am. Dec. 155; *Cassiday v. McKenzie*, 39 Id. 77; *Bell v. Western M. & F. Ins. Co.*, Id. 542; *People v. Cunningham*, 43 Id. 709; *Riddle v. Dixon*, 44 Id. 207; *Bailey v. Shaw*, 55 Id. 241, and notes to the same.

WOOLFORK'S ADMINISTRATOR v. SULLIVAN.

[23 ALABAMA, 548.]

SALE OF PERSONALTY OF TESTATOR BY EXECUTOR *de son tort* is unlawful, whether it be public or private, and conveys to the purchaser no title.

BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION at a public sale made by an executor *de son tort* acquires a right of possession in personalty which he may maintain and defend against every one but the proper

legal representatives of the testator; and if an actual possession has been acquired against him also, he can not be lawfully deprived thereof against his will except by suit.

EXECUTOR OR ADMINISTRATOR HAS POWER IN ALABAMA TO COMPROMISE actions pending in favor of, or rights of action belonging to, the testator or intestate, if done *bona fide*.

WHERE EVIDENCE IS CONFLICTING, on a question of fact material to the defense, the plaintiff is not entitled to a charge asserting his right to a recovery on the whole evidence.

APPEAL from the circuit court of Pickens. Detinue by A. E. Goings, as administrator *de bonis non*, with the will annexed, of Thomas Woolfork, deceased, against William Sullivan, for two negro slaves. The pleas were *non detinet* and the statute of limitations. Testator made his will in 1840, which was in these words: "I give my wife everything I possess during her widowhood; if she marries, she is to have third; not to give security when she qualifies unless she marries, then to give security immediately." In January following Mrs. Woolfork, holding herself out as executrix, sold the slaves in controversy, at public auction, to John McKinney, he giving his note in payment therefor. Upon Mrs. Woolfork's marriage, two years later, E. Nosworthy was appointed administrator, and McKinney's note was received in due course of administration, although there was no evidence tending to show whether the administrator received full satisfaction of the same. Plaintiff was appointed administrator in 1848, and the note coming into his possession, he commenced this action. The court charged the jury that "the sale made by Mrs. Woolfork was null and void, but the administrator in chief, Nosworthy, after he was duly qualified, had the right to waive the tort and sue Mrs. Woolfork for the money; and that having this right, he also had the right to receive their value from Mrs. Woolfork or her agent; and if the jury believed from the evidence that Nosworthy had received from Mrs. Woolfork's agent, or from McKinney, or from both, full satisfaction for the value of said slaves, then plaintiff can not recover in this action." To this charge plaintiff excepted. Plaintiff requested the court to charge the jury, that if they believed the evidence in the case they must find for the plaintiff. This charge was refused by the court for the reason that there was some conflict in the evidence as to whether the administrator had received full satisfaction for the slaves sold. To this the plaintiff excepted and took an appeal.

S. F. Hale and J. L. Martin, for the plaintiff.

E. W. Peck, for the defendant.

By Court, PHELAN, J. Where an executor *de son tort* has sold at public sale the personal property of a testator, and an administrator is afterwards appointed, what right or interest in respect to such property vests in such administrator? and what are his powers and duties in reference thereto, by the laws of Alabama? These are the questions presented for our decision by the case at bar.

The sale of the personal chattels of a testator, by one who usurps the office of executor, whether willfully or ignorantly, and who is styled executor *de son tort*, is unlawful, whether it be public or private, and conveys to the purchaser no title. That is clear. Hence the sale by Mrs. Woolfork conveyed no title to the slaves in controversy, and was a conversion of the property of the estate, in her and her vendee. Still it conveyed what she had, the possession. Being in possession as widow (for she was widow and sole legatee), and holding herself out as executrix, she advertised and sold this property as such at public sale, and McKinney, defendant's vendor, became the purchaser in good faith, and for a full consideration. There can not be any doubt that he acquired thereby a possession and a right of possession which he could maintain against all the world except the administrator of Woolfork. He is surely in no worse condition than a vendee from an administrator by a private sale, which the statute expressly forbids, and which our courts have repeatedly pronounced to be absolutely void: Clay's Dig. 223, secs. 13, 14; *Wier v. Davis*, 4 Ala. 442. And yet such a vendee will be protected in his possession against every one but the administrator *de bonis non*. Even the administrator himself who made the sale can not reclaim the possession, for he is estopped by his acts from the right to sue: *Pistole v. Street*, 5 Port. 64; and an execution against the goods and chattels of the testator can not be levied on the property so as to take it: *Wier v. Davis*, *supra*.

We are then constrained to hold that a *bona fide* purchaser, for a valuable consideration, at a public sale made by an executor *de son tort*, acquires a right of possession in a personal chattel which he may maintain and defend against every one but the proper legal representative of the testator; and that, furthermore, he acquires an actual possession as against him also, of which he can not be lawfully deprived against his will except by suit.

The necessary conclusion from these premises is, that the interest or right which an administrator acquires under such circumstances is a right of action only, what is called a chose in action, when we mean to speak of it as property, as something

that has value, like a promissory note in its general nature, though differing in some respects.

2. The question now remains, What are the rights and powers of an executor or administrator respecting the choses in action of his testator or intestate? Can he compromise or settle them without bringing suit?

We do not understand the doctrine to be questioned on either hand, that an executor or administrator in this state has all the rights and powers which he has by the common law, except so far as those rights and powers have been modified or abridged by statute.

But the power of an executor or administrator to compromise actions pending in favor of, or rights of action belonging to, the testator or intestate, by the common law, if done *bona fide*, is not denied, and this power has not been affected by statute in Alabama. It can hardly be insisted that the statute, Clay's Dig. 223, sec. 13, which directs the mode in which executors and administrators shall proceed to effect a sale of the "personal estate of any testator or intestate," and directs that it shall be done publicly, and at a certain place, and within certain hours, was intended to embrace the notes and bonds or open accounts due to a testator or intestate. Such a thing has never been heard of in the country. Much less could it have been intended to relate to choses in action whose value would be still more obscure at a public sale. It follows that an executor or administrator in this state has the power in question, and by necessary consequence the right, to this extent, at least, to transfer by private sale or contract the choses in action over which this power to compromise and settle without suit exists; for what is the release of an action already begun, or the transfer of a right of action, but a private sale of the benefit or interest to be derived from it?

Following up these conclusions, we may say the sale of these slaves by Mrs. Woolfork was an unlawful conversion of the property of the estate; yet by the transaction McKinney was invested with a possession which could not be lawfully taken away except by suit. No execution could be levied on them as the property of Woolfork, the testator, and it would amount to a trespass for any to attempt to take them by mere force. When Nosworthy was appointed administrator of Woolfolk, he had in respect to these slaves nothing left in him but a right of action, with several modes of prosecuting that right, either of which he might pursue: detinue or trover against the person in possession; trover against the widow Woolfork; or, if the pur-

chase money had been received by her, or her agent, of McKinney, he might waive the tort and bring an action against her for that amount of money of the testator had and received to his use.

Having this right and such an interest, and no more, and being invested by his office and the law with the power in his discretion to bring suit, or to compromise and settle the claim without suit, he was not absolutely bound to sue and recover the property itself, or have its value ascertained by suit; but, if acting *bona fide*, without fraud or collusion, he might settle the claim without suit, and release and discharge this right of action to any of these parties for a valuable consideration. The interests of creditors and distributees require, as we feel well persuaded, that executors and administrators should have such a power. A judicious and timely compromise would often prove highly beneficial to creditors and distributees. The fidelity of the administrator, the *bona fides* of his conduct in making such settlement or compromise, would be always open to inquiry by the parties in interest.

These principles, if correct, establish the right of the administrator, Nosworthy, to receive satisfaction from Mrs. Woolfork, or McKinney, or both, without suit, for the unlawful conversion of the slaves in controversy. He was at liberty to elect whether he would do this or sue, being responsible of course to the legatees and distributees on settlement for the exercise of a sound discretion, and for honest intentions in making such election.

The charge given by the court below was in conformity with the foregoing views, as was also the qualification annexed to the charge as requested by plaintiff.

The request of the plaintiff to charge that he was entitled to a verdict upon the whole evidence was correctly refused, because on one material question of fact the testimony was conflicting.

We find no error in the record, and the judgment below is affirmed.

EXECUTOR DE SON TORT, VALIDITY OF ACTS OF: See note to *Arnold v. Arnold*, 55 Am. Dec. 434.

BONA FIDE PURCHASERS, TITLE OF, HOW FAR PROTECTED: See notes to *Williams v. Merle*, 26 Am. Dec. 605; *Swift v. Holdridge*, 36 Id. 85; *Hoffman v. Noble*, 39 Id. 711.

INSTRUCTIONS BASED ON DIFFERENT STATE OF FACTS from that proved should be refused: *Henderson v. Western Ins. Co.*, 43 Am. Dec. 176; *Kenan v. Holloway*, 50 Id. 162; *State v. Hildreth*, 51 Id. 369; *Pennington v. Yell*, 52 Id. 262.

SMOOT v. ESLAVA.

[23 ALABAMA, 659.]

PAYMENT BY GARNISHEE OF JUDGMENT, rendered against him as such, will protect him against a suit upon the original claim.

WHERE TWO JOINT MAKERS OF NOTE ARE GARNISHED as debtors of the payee, and answer admitting their indebtedness, but fail to disclose the fact that they have been notified of the transfer of the note, a payment of the judgment rendered against them on their answer will not discharge them from liability to the real owner.

TRANSFEREE OF NOTE WHO HAS BEEN NOTIFIED of payment of the same, and fails to appear and assert his rights, is estopped from setting up any claim against the garnishees.

GENERAL OBJECTION TO EVIDENCE which does not distinguish between the legal or illegal may be overruled.

APPEAL from the city court of Mobile. Smoot & Ketchum, plaintiffs in error, were garnished at the suit of *Burke & Co. v. Eslava et al.*, and answered that they had given certain notes to Eslava. Ketchum also answered that he had been notified that the notes had been transferred to Roberts, defendant in error. Plaintiffs in the judgments upon which the garnishments issued contested Roberts' right to the notes as transferee, and he was notified to appear and contest. Failing to appear, a judgment was rendered that he be barred from setting up any claim to the notes, and against the garnishees for the amount specified in their answers. The record also showed that the day following the garnishment the garnishees were sued in a justice's court by the defendant in error upon one of the notes alluded to in their answers, and that before the filing of the answers the justice rendered judgment against them. The proceedings were removed to the city court, and defendants pleaded that they had paid the judgment rendered against them. In the course of the trial, plaintiffs offered in evidence the note sued on, and also offered to show that the note sued on had been transferred by Eslava to Roberts prior to the garnishment in payment of a *bona fide* debt, that defendants were informed of the transfer, and that Smoot knew that Roberts was the owner of the note sued on at the time he answered. The evidence was objected to as irrelevant, but the objection was overruled. Plaintiff then proved that the garnishments were sued out by Smoot as agent of the judgment creditor, and that on the day on which judgment was rendered they paid the money to the clerk of the court, who paid it back to Smoot as attorney of the plaintiffs, in whose favor judgment had been rendered. An objection being taken but not allowed,

and judgment being rendered in favor of the plaintiff, defendants appealed.

John T. Taylor, for the plaintiffs in error

C. W. Rapier, for the defendant in error.

By Court, GOLDTHWAITE, J. It has repeatedly been held by this court that a payment by a garnishee of a judgment, rendered against him as such, will protect him against a suit upon the original claim: *Duncan v. Ware*, 5 Stew. & P. 119 [24 Am. Dec. 772]; *Cook v. Field*, 3 Ala. 53 [36 Am. Dec. 436]; *Mills v. Stewart*, 12 Id. 90. In the present case, however, the object was to take the case out of this rule, by showing that one of the garnishees did not, in his answer, disclose the fact that the note in which he was indebted had been transferred to the person who afterwards sued upon it, such fact being within his knowledge at the time he answered. Unquestionably, if neither of the answers had shown that Roberts claimed an interest in the note, and he not had an opportunity of asserting his right thereto, the garnishees, if advised of the transfer at the time of their answer, would not have been discharged from their liability to the real owner by the payment of the judgment rendered against them: *Colvin v. Rich*, 3 Port. 175; *Foster v. White*, 9 Id. 221.

But in the present case the answer of Ketchum shows that Roberts claimed an interest in the debt, and as he was duly and legally notified that his right as transferee would be contested, he had the opportunity of asserting that right; of this he did not avail himself, and his failure to appear, when taken in connection with the judgment rendered by the court, estops him from setting up any claim for the note against the garnishees who were parties to the same proceeding.

It is obvious from what we have said that the evidence on the part of the plaintiffs below, showing that Roberts was the *bona fide* transferee of the note in question, as well as that which tended to prove that Smoot knew that such was the fact at the time of his answer, was irrelevant. As, however, the record shows that this evidence was offered in connection with the note sued on, which was legal testimony, and the objection was taken to the whole evidence, without distinguishing between the legal and illegal, it was not error in the court to overrule it: *Murrah v. Branch Bank*, 20 Ala. 392.

But in relation to the evidence which proved that, after the garnishees had paid the amount of the judgment to the clerk of

the court in which it was rendered, he immediately paid it back to one of them, as the attorney of the plaintiffs in the judgment, it was irrelevant; and as the objection to this testimony was properly taken, it should have been sustained by the court.

For this error the judgment is reversed, and the cause remanded.

GARNISHMENT, PLEA OF, IN ABATEMENT.—Judgment against a garnishee which has been satisfied will operate as a defense: *Cook v. Field*, 36 Am. Dec. 437. See also *Crawford v. Clute*, 41 Id. 92; *McVicker v. Beedy*, 50 Id. 666; *Smith v. Blatchford*, 52 Id. 504, and notes, where the subject has been fully discussed.

TRANSFeree OF NEGOTIABLE NOTE, RIGHTS AND LIABILITIES OF: See *Dugas v. Matthews*, 54 Am. Dec. 361, and cases cited in note thereto.

KREBS v. O'GRADY.

[23 ALABAMA, 726.]

NOTE PAYABLE TO WIFE IS ALSO PAYABLE TO HUSBAND, and can only be transferred by his act; but where she is authorized to take notes as a *feme sole*, title will pass by her indorsement.

WIFE WILL BE REGARDED AS FEME SOLE when her husband has abandoned her and left the state without an intention of returning.

WIFE MAY ACT AS AGENT OF HUSBAND, and a note payable to her may be indorsed by her in her own name, and if done with the assent of the husband, the indorsee acquires a valid title.

APPEAL from the circuit court of Mobile. Krebs sued out an attachment against J. McGinnis, and summoned J. C. Morton as garnishee. Morton denied any indebtedness to the defendant in attachment, and stated that he had executed his notes to the wife of the defendant, and that they had been transferred to O'Grady, the defendant in error; the latter was then summoned as transferee. It was proved on the trial that the notes were given by the garnishee for the fixtures of a bakery occupied by the defendant in attachment. The latter left for California four months prior to the making of the notes, the business being carried on by his wife. The notes were payable to her, and indorsed by her to the defendant in error for the payment of a debt contracted with him while trading on her own account for supplies necessary in carrying on the business; and that defendant in attachment was still absent in California and had failed to assist his wife in any manner. The court held that in a case of abandonment the wife might take a note payable to herself and indorse it in her own name, and thereby pass title if

the husband had not expressed his dissent; that as to the effects of the husband during abandonment the wife would be considered as his agent, and she would be presumed to act within the scope of her powers unless he dissented; that if the debt alluded to was a *bona fide* debt, the transfer was good, and that such transfer would be good as against the plaintiff, it being prior in point of time to the attachment.

C. W. Raper, for the plaintiff.

Percy Walker and George N. Stewart, for the defendant.

By Court, GOLDTHWAITE, J. That a note payable to the wife is in legal effect a note payable to the husband, and, as a necessary consequence, can be transferred by his act alone, is, as a general proposition, well settled. There are, however, exceptions to this rule, and cases may exist in which the wife is authorized to take notes as if a single woman; and in such case it follows that the title would pass by her indorsement. According to the later English decisions, this can only happen when the husband is civilly dead, or his absence is involuntary, as when he is an alien enemy: *Marshall v. Rutton*, 8 T. R. 547; *Marsh v. Hutchinson*, 2 Bos. & Pul. 226; *Bogget v. Frier*, 11 East, 301; *Barden v. Keverberg*, 2 Mee. & W. 61; 2 Roper H. & W. 121. In this court we have held that where the husband has abjured the state, and the wife has acted as a *feme sole*, she will be so regarded: *Arthur v. Broadnax*, 3 Ala. 557 [37 Am. Dec. 707]; *James v. Stewart*, 9 Id. 855. The question, however, as to what constitutes an abjuration of the state, so as to take the wife out of the disabilities of coverture, has not been settled with precision. We all, however, agree that there can be no abjuration in this sense without an abandonment of the wife, and a removal from the state without an intention of returning: *Mead v. Hughes*, 15 Id. 141 [50 Am. Dec. 123].

The wife may, however, act as the agent of her husband; and a note payable to her, although in legal effect it is payable to him, may be indorsed by her in her own name; and if done with the assent of the husband, the indorsee acquires a valid title. And this assent is not required to be expressly proved, but may be inferred from circumstances. Such was the decision of this court in *Roland v. Logan*, 18 Ala. 307; and under the influence of this principle, if a wife was living separate from her husband, and doing business in her own name, with his knowledge, her contracts within the scope of that business would be valid and binding, unless the husband dissented. His assent would in

such a case be presumed. If the character of the business was such as naturally to include the sale or disposition of the husband's effects, the same principle would apply; but where such disposition was not within the legitimate scope of the separate business, most certainly no presumption of law could be created, and the jury would not be authorized to presume the husband's assent to the disposition unless their minds were fairly brought to that conclusion by the facts before them in evidence.

The wife, in the absence of the husband, may have a general authority to exercise the usual and ordinary control over the property left in her possession by him, which must be controlled by some one; unless the presumption of this authority is rebutted by proof that he had constituted some other person his agent for that purpose: *Church v. Landers*, 10 Wend. 79. But the sale of the husband's effects may be outside of the usual and ordinary control of them; and whether it is so or not must depend upon the nature of the property, the length of the absence, and perhaps other circumstances. If the husband went to California, leaving the wife to carry on his plantation during his absence, it would not follow as a presumption of law that he had given her authority to sell and dispose of his slaves, and transfer the notes received in payment for them. So, in the present case, although the husband may have consented that his wife might carry on the business of the bakery in her separate name, that fact does not create a legal presumption that she was authorized to transfer the notes received from the sale of the fixtures, which in law were payable to her husband; and that they were transferred in payment of a debt contracted by her in the course of the separate business can have no influence. The question is purely one of authority so far as she is concerned; and all we decide on this branch of the case is, that the circumstances we have stated did not amount to presumptive evidence that she had authority from the husband to transfer the notes in question. It was for the jury to say whether this evidence would fairly bring their minds to this conclusion.

As a portion of the charge given by the court was in opposition to the views we have expressed, the judgment must be reversed and the cause remanded.

GIBBONS, J., not sitting.

MARRIED WOMAN, WHEN REGARDED AS FEME SOLE: See cases cited in note to *Dorrance v. Scott*, 31 Am. Dec. 509, and the note to *Arthur v. Broadnax*, 37 Id. 707, where the questions treated of in the principal case are discussed at length. See also *Rogers v. Phillips*, 47 Id. 727; *Mead v. Hughes*, 50 Id. 123.

MINTER v. BRANCH BANK AT MOBILE.

[23 ALABAMA, 762.]

FAILURE ON PART OF CREDITOR TO PRESENT HIS CLAIM to the administrator of the principal debtor within the statutory time after the grant of letters does not discharge the sureties of such principal, nor affect creditors' rights to proceed against them.

STATEMENT IN LETTER ANNEXED AS EXHIBIT TO BILL, and prayed to be taken as part of it, will, unless qualified in some manner, become the statement of the bill.

DEPENDANT IN EXECUTION MOVING TO SET ASIDE SHERIFF'S RETURN, on the ground that the money had been tendered and refused, must show that such a state of facts existed, in order to be entitled to relief.

APPEAL from the chancery court of Dallas. Injunction. W. T. Minter and Matthew Gayle filed their bill against the Branch Bank at Mobile, alleging that the defendants had recovered judgment against them, as sureties of one Pritchard, on a note. Execution was issued, and it was paid in full, each paying one half. The sheriff applied to the bank to pay the money over, and was informed that the bank had no such claim. Gayle's money was returned, and Minter's was paid over to the bank on another judgment which the latter held against him. Seven years afterwards another execution was issued against the plaintiffs on said judgment for the amount of the original judgment, and interest accruing to date of execution. It was further alleged that the bank neglected to present Pritchard's note to his administrator within eighteen months after the granting of letters, and thus lost its remedy. A letter from the assistant commissioner of the bank was annexed to plaintiffs' bill, with a prayer that it be taken as a part thereof. The letter, among other things, stated that the sheriff's return on the execution, made in 1844, was set aside by the circuit court of Mobile in 1848, and execution ordered to proceed. The chancellor dismissed the bill for want of equity, and an appeal was taken.

George W. Gayle, for the plaintiffs.

J. W. Lapsley, for the defendants.

By Court, **PHILAN, J.** There is nothing in the point that the bank neglected to present the note on which the plaintiffs in error were sureties only against the estate of Pritchard, their principal, within eighteen months after the grant of letters on his estate, and so lost its remedy on him, and that they, as sureties, will be allowed to stand in the same position as their principal. The question is already settled to the contrary, in the case of *McBroom v. The Governor*, 6 Port. 32.

The bill as to the demand for interest on the judgment from 1844, when the money, as it is alleged, was tendered to the bank and refused, would, we incline to think, have equity in it, if this allegation were not deprived of its force by the adoption of the letter of Mr. Holcombe, the assistant commissioner, to the solicitors of the complainants, as part of the bill. The statements of this letter relating to the subject-matter of the bill are thereby made the statements or averments of the bill, since they are not in any manner qualified, but simply annexed by way of exhibit, and prayed to be taken as part of the bill. This letter states directly that the receipts of Connolly, the sheriff of Dallas, as for money received of Gayle and Minter in 1844 in full satisfaction of the execution, and indorsed upon it, were nullities, and were so pronounced, and the same, as a return of the sheriff, set aside by judgment of the circuit court of Mobile, after a full hearing in 1848; and that execution on the judgment was ordered to proceed.

This is equivalent to an admission in the bill that, in 1848, the return of the sheriff was upon a full hearing, which implies of course due notice to the complainants, set aside, and the execution ordered to proceed. Such an admission, it must be seen at once, does away with the force of that part of the bill which alleges that the money had been paid, that the same was afterwards tendered and refused, and praying that no interest should be allowed from the time of the tender and refusal.

On the motion to set aside the return of the sheriff, it was competent for the defendants in the execution (the complainants in this bill) to have shown that the money had been paid, as the return showed, and had been tendered and refused, and by tendering it then anew, to avoid interest and any further issue of execution. If this was not done or attempted, and the complainants have not explained the omission satisfactorily in their bill, the presumption exists that, as there was a lawful opportunity to submit that defense to the further issue of execution and the payment of interest, it was done, and the matter is *res adjudicata*.

Putting this construction upon the bill as a whole, and we see no way to avoid it, the decree of the chancellor dismissing it for want of equity was proper.

We are, however, of opinion that the bill should be dismissed without prejudice. Let a decree be rendered here accordingly, at the cost of the plaintiffs in error.

STEELE v. WYATT'S ADMINISTRATOR.

[23 ALABAMA, 764.]

WHERE COURT ORDERED SALE OF ALL PERISHABLE PROPERTY of an estate, and the administrator sold all the personal property, including a number of negroes, and made his return, which was duly recorded, and the administrator *de bonis non* afterwards brought detinue for one of the negroes sold: *held*, that in the absence of a statutory definition of the term "perishable property," the sale passed the legal title to the slaves.

APPEAL from the circuit court of Lowndes. Action of detinue brought by the appellee, administrator *de bonis non* of Peter Wyatt, deceased, for a slave. Deceased was the owner of the slave, and after his death his widow and her brother administered on the estate until they were removed and plaintiff appointed in their stead. On the trial, it was proved that the first administrators obtained the following order from the orphans' court: "Ordered by the court that the administrators of the estate of Peter Wyatt, deceased, have leave to sell all the perishable property of said deceased, upon a credit of at least six months." Under this order, they sold all the personal property, including the slave in question, the latter being bid off by Mrs. Wyatt. A sworn statement of the sale was received by the court and ordered to be filed. The jury were instructed that the order mentioned above conferred no authority on the administrators to sell the slaves; that the sale was void, and that the order confirming the sale did not legalize it. Defendants excepted. Plaintiff obtaining judgment, defendants appealed.

Watts, Judge and Jackson, and George W. Stone, for the appellants.

T. Williams, for the appellee.

By Court, GIBBONS, J. The first charge of the court to the jury was, that the several orders above set out did not confer upon the administrators in chief authority to sell the slaves, and that such sale was void; meaning, we presume, that such sale was void as against the plaintiff in the action, for as against the administrators in chief it was not void, as is shown in a subsequent charge of the court, where it states that the administrators in chief would be estopped by their sale from asserting a title in their names. Giving to the charge this interpretation, the question is, whether the court was or was not correct in its charge.

The sale seems to have taken place in February, 1834; and the act under which the orders were made is as follows, to wit:

"It shall not be lawful for any executor or executors, administrator or administrators, guardian or guardians, to take the estate, or any part thereof, of any testator or intestate, at the appraised value, or to dispose of the same at private sale, except where the same is directed by the will of the testator. But in all cases where it may be necessary to sell the whole or any part of the personal estate of any testator or intestate, it shall be the duty of the executor, administrator, or guardian to apply to the orphans' court of their county for an order of sale, and obtaining the same, to advertise the time and place of such sale in three or more public places in the county, at least thirty days previous to the day of sale, and then and there proceed to sell the same at public sale to the highest bidder, giving at least six months' credit; the purchaser giving bond with approved security:" Clay's Dig. 223, sec. 13. We say the order of sale was made under this act, because this is the only act upon the subject under which it could have been made.

The term "perishable property," in its most enlarged sense, would mean all personal as distinguished from real property; whilst in its most restricted sense, it would only mean such personal property as had in itself the elements of destruction or decomposition, as for instance, fruits, or such productions from the labor and skill of man as are ephemeral in their existence, or evanescent and changeable in their value. In this latter sense, it would ordinarily comprehend but very few articles belonging to an estate. If we apply to the orders of the court on which the charge under discussion is predicated the most enlarged sense of the term, it is clear that it did confer on the administrators all the authority necessary for the legal disposition of the property. If, on the other hand, we apply to them the most restricted sense, then it is equally clear that the order would not confer such authority. It does not appear from the present record whether there was belonging to the estate, at the time that the orders were made, any property that would properly range itself under the latter of the above definitions of the term "perishable property;" all that does appear is, that all the personal property of the estate was sold, and the negro in question with the other negroes of the estate.

It will be observed here that in reference to the effects of estates, our statute has given no definition of the term "perishable property;" nor is there any act authorizing the orphans' court to make any order in reference to that particular species of property. The term, it is true, has received a legislative in-

terpretation in reference to the attachment laws of the state, and it is there said to be that "which is likely to waste or be destroyed by keeping:" Clay's Dig. 56, sec. 8; but whether the legislature would apply the same meaning to the term when used in reference to the estates of deceased persons we know not, as it has not as yet thought proper to give it any definition whatever as applied to such estates. The term, then, as employed in the order of the court, could have no reference to any technical meaning given to it as applied to estates in the hands of personal representatives, as the term then had no legislative technical meaning, nor has it any as yet, as applied to such estates. It is clear that if the statutes had defined what should be considered as perishable property, as applied to such estates, or even if the term was known to our law at all in a legislative technical sense, as applied to the general property of decedents, then the term, as used by the court in the order above referred to, would have to receive such statutory interpretation. But in the absence of any such definition, what rules of interpretation shall we resort to in order to ascertain the meaning of the term as used by the court, or to comprehend in what sense the court making the order and the parties acting under it understood it? I confess I know of no better rule, under such circumstances, than to let the parties themselves be the interpreters, by showing what they themselves understood by it. The moment we adopt this means of ascertaining the meaning of the orders there is no longer any mystery. We find that under the order the administrators proceeded and sold the whole of the personal property of the estate, precisely as if the order had been to sell the personal instead of perishable property.

The order, on its face, was in all respects as if it was intended to mean the personal property generally, and to be strictly a statutory order. The only word in the whole order that prevents it from being strictly such is that "perishable" is used instead of "personal" as a prefix to the word "property." The sale is made, and an account thereof returned to the court, according to the order; and the account passed, and the proceedings of the administrators sanctioned and approved, as much as it was in the power of the court so to do, precisely as if the order had been to sell the personal instead of the perishable property. Under these circumstances, we think we are authorized to say that such was the meaning of the order under which the sale was made. That such was the understanding of the parties acting under the order, and of the court itself mak-

ing it, we think clear; and in the absence of a statutory definition of the term "perishable property," as applied to the estates of decedents, by which the term has to receive a strict statutory technical meaning, we see no reason why we should not give to the order now the same interpretation that the court making it and the parties acting under it gave it at the time that it was made. From this view, it follows that the court erred in this charge as given to the jury, as the orders of the court under which the sale was made were ample to confer upon the administrators in chief the authority to sell the property and pass the legal title thereto. This we regard as decisive of the whole case, and therefore do not deem it necessary to consider the remaining questions raised by the record.

The judgment of the court below is reversed, and the cause remanded.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

EX PARTE MARTIN.

[18 ARKANSAS, 198.]

INJUNCTION IS NOT GRANTED UNLESS COMPLAINANTS ARE ENTITLED TO DAMAGES AT LAW and the remedy at law is not adequate.

PRIVATE PROPERTY CAN NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION, though no such provision be contained in the state constitution; for this prohibition upon the legislature is implied from the nature and structure of the government, even if it were not embraced by necessary implication in other provisions of the bill of rights.

RIGHT OF EMINENT DOMAIN IS INHERENT IN SOVEREIGN POWER, and equally so is the vested right to his property in the citizen.

RIGHT OF EMINENT DOMAINS MEANS THAT WHEN PUBLIC NECESSITY or common good requires it the citizen may be forced to sell his property for its fair value.

ARTICLES OF STATE CONSTITUTION GUARANTEEING TO CITIZEN the right of acquiring, possessing, and protecting property necessarily imply the prohibition upon the legislature from taking private property for public use without providing for just compensation to be first made to the owner.

AGENTS OF STATE ARE LIABLE IN DAMAGES FOR TRESPASS OR WASTE COMMITTED, in the prosecution of a public work, to individuals whose rights are not concluded by a just compensation awarded for the loss or injury to their property.

INJUNCTION MAY BE GRANTED TO RESTRAIN ACTS OF AGENTS OF STATE, engaged in the prosecution of a public work, when the injury resulting to individuals is not compensated, and amounts to a nuisance liable to continue, or causes damages likely to be irreparable; or by decree the nuisance may be abated.

STATE IS NOT NECESSARY PARTY TO SUIT AGAINST COMMISSIONERS engaged in prosecution of a public work, though the acts complained of be within the scope of their authority, for they must defend under the law and their authority; and even if made a party, it might be that the only way to afford the relief sought would be to enjoin her agents or officers.

INHERENT JURISDICTION OF EQUITY TO GRANT INJUNCTION OR ABATE NUISANCES should be exercised with caution.

INJUNCTION TO STOP UNDERTAKING OF PUBLIC NATURE or of private nature, if in the latter great expense has been incurred, will not be granted without a reasonable notice to the defendants, and then the chancellor may well hear affidavits in support or denial of the bills.

NO NOTICE TO DEFENDANTS OF APPLICATION FOR SPECIAL INJUNCTION OUGHT TO BE REQUIRED in cases where the injury may be immediate and destructive, and thus irreparable, or where the giving of the notice might precipitate the act sought to be enjoined.

BILL IS TO BE TAKEN MOST STRONGLY AGAINST PLEADER.

WHERE GIST OF BILL FOR INJUNCTION OF PUBLIC WORK is the want of a culvert, which would prevent the threatened injury, and which the complainants allege they were authorized to construct, it will be presumed, in the absence of any allegation to the contrary, that sufficient time has elapsed to enable them to procure the culvert; and the injunction will be refused.

APPLICATION for *mandamus*. The opinion states the case.

English, Hanly, and Palmer, for the petitioners.

By Court, **WATKINS, C. J.** This is an application for a *mandamus* to the judge of the Phillips circuit court in chancery, to compel him to grant an injunction upon the bill presented to him, his refusal being indorsed as required by the statute.

The substance of the bill, briefly stated, is that the complainants are the owners in fee of a plantation near the Mississippi river, about four miles south of Helena, including section 30 in township 2 south, of range 5 east; that levees are necessary for the protection of these and other lands lying in the Mississippi bottom, as it is called; and that these levees sometimes have to cross bayous abounding in that region of country, emptying in the river, and which also serve as natural drains to carry off the rain-water falling on lands in the rear, which would otherwise flood the adjacent lands, and become stagnant, and be injurious to health, and an obstruction to the agricultural operations of the planters in their vicinity. That a watercourse known as Long Lake, which serves as a natural drain for large bodies of land, including that of the complainants, and which runs through a portion of their cultivated lands, and in which there is at all times a current, though at low water almost imperceptible, was levied across in the months of July and August, A. D. 1852, by the swamp-land commissioners for the state of Arkansas, Cincinnatus Trousdale, Creed Taylor, and John W. Buckner, under the superintendence of one of their subcommissioners, Boyd Bailey; that in the construction of the levee a wooden culvert was put in the bed of the bayou, so as to ad-

mit the free passage of the water through the levee, but that since the erection of the levee, the wooden trunk or culvert, owing to the pressure of the levee, or some other cause, has given way; and that one John S. Deputy, under the direction and supervision of the subcommissioner, is proceeding to remove the dilapidated trunk or culvert for the purpose of filling up the levee solid, and so obstructed the flow and drainage of water in the bayou. That the levee crosses the bayou at a point from the lands of the complainants on one side to the land of Deputy on the other side. That Long Lake bayou, after pursuing a tortuous course, empties into the Mississippi twelve or fourteen miles below the plantation of the complainants. The bill proceeds to detail the effect and operation, as anticipated, of such a stoppage in the flow of the water in the stream, if so obstructed, and explains that while the effect would not be injurious to Deputy, because there is a drainage from his lands into Long Lake bayou, below the point where the levee crosses, it would be injurious to the lands of the complainants and others not so situated. And the complainants aver that the effect of the stoppage would be to overflow a large portion of their lands, improved and unimproved, and to back the water up into one of their fields now in cultivation, destroying for agricultural purposes more than twenty-five acres of it, and to make a long and large pond about the center of one of their fields; and, by the stagnation of the water, to prejudice the health of the adjacent country, including the plantation of the complainants, where they have more than seventy-five slaves. The bill further alleges that the levee commissioners, at a meeting of their board in October last, authorized the complainants to have an iron culvert or trunk made of suitable dimensions to permit the natural flow and drainage of the watercourse to be placed therein where the levee crosses it, and prevent the injuries anticipated, and which they propose doing as soon as possible.

The swamp-land commissioners, the subcommissioners, and deputy are made defendants, and the bill prays for a decree that, in the repair and construction of the levee, the defendants be required to place in it a trunk or culvert of sufficient size to permit the natural flow and drainage of the water; and that, in the mean time, and until the further order of this court, they be enjoined from making the levee solid at the point described, and for general relief.

Supposing the allegations of the bill, the substance of which we have stated, to be true, as upon an *ex parte* proceeding, we

will consider them, for all the purposes of this application, to be sufficiently full and explicit.

The levee complained of is being made under the act of the general assembly to provide for the reclaiming of the swamp and overflowed lands donated to this state by the United States, approved January 6, 1851, and the supplemental act approved January 11, 1851, and is part of a system of public works, designed for the good of the whole people, but from which it must be supposed that some individuals will suffer partial loss or inconvenience.

By the third section of the act first mentioned, the powers and duties of the swamp-land commissioners are defined to be—1. To fix the price of the swamp and overflowed lands donated to the state of Arkansas by the act of congress entitled “An act to aid the state of Arkansas, and other states, to reclaim the swamp lands within their limits,” approved September 28, 1850, in their present condition, taking into consideration their locality, and the value that will be added to said lands by their reclamation, lists of which, with the valuation of each tract or legal subdivision, shall be forwarded to the governor, subject to his approval or rejection; 2. To determine the locality, extent, and dimensions of the necessary levees and drains, in order to reclaim said lands; 3. To district and classify said lands, and to let out the making of said levees and drains by contract to responsible persons, at a stipulated price per cubic yard, to the lowest and best bidder. And by subsequent sections, they are required, by themselves and assistants of their own appointment in each county, to proceed immediately to ascertain and designate the swamp and overflowed lands granted to the state by the act of congress, and they are also empowered to appoint subcommissioners to aid them in the location and construction of the necessary levees and drains, and in classifying and districting the lands.

The acts of assembly referred to make no provision for compensation to persons, where private property is taken for public use in constructing levees or drains, although they seem to have contemplated that loss or injury to individuals might ensue, and by section 12 of the original act, and section 2 of the supplemental act, which are directory, the commissioners are required to construct the proposed levees as near as practicable to the bank of the river, or other watercourses, and so that in all cases they shall follow the general course of the rivers, and be so located as to accomplish the largest amount of reclamation with

the least injury and inconvenience to individuals; and the commissioners are directed, in letting out contracts for levying on the Arkansas river, to proceed with the work on both sides of the river simultaneously, so far as practicable to afford equal protection to the cultivators and occupants of land on either side of the river. These are the only provisions bearing on the subject, and it is obvious, that in order to construct the levees and drains required, private property must be taken for public use, not only in respect of the ground occupied by the levee or drain, but where, in consequence of the levee, land of an individual is liable to be overflowed and rendered useless. Here, for instance, the land occupied by the levee complained of might be inconsiderable, and of but little moment in comparison with other injuries directly resulting from it; and the overflowing of land adjacent, where it is a necessary consequence of the levee as constructed, is virtually a condemnation of it to public use.

The complainants are not entitled to specific relief by way of injunction, except it be conceded that they would be entitled to damages at law, and that the remedy at law is not adequate. And the inquiry arises here whether the legislature intended that the work of reclaiming the swamp lands should be effected without making compensation to individuals who might be injured by it, and if such was the intention, then the inquiry arises whether the legislature have the power to take private property for public use without just compensation to the owner; because, if this be so, the complainants may be injured by the acts sought to be enjoined, but it would not be an injury for which they would have a right to redress by suit, and their only remedy is, if such be the case, in entreaty or petition to the legislature.

The constitution of this state contains no provision that private property shall not be taken for public use without just compensation; yet we hold that this prohibition upon the legislature is implied from the nature and structure of our government, even if it were not embraced by necessary implication in other provisions of the bill of rights. The right of eminent domain is inherent in the government or sovereign power, and equally so is, or ought to be, in every government of laws, the vested right to his property in the citizen; and the right of eminent domain means that when the public necessity or common good requires it, the citizen may be forced to sell his property for its fair value. The duty of making compensation may be regarded as a law of natural justice, which has its sanction in

every man's sense of right, and is recognized in the most arbitrary governments. To suppose that the legislature under our constitution possessed the power of divesting the citizen of his right to property without first providing in some equitable mode for ascertaining its value, and making him compensation for it, and could exercise this power without restraint, would be subversive of the government and equivalent to revolution and anarchy, since it would defeat one of the primary objects for which the government was established. It is certainly true that the general assembly, in the appropriate exercise of its legislative functions, is to be considered as having the residuum of all sovereign powers not parceled out to any other department, and that it may pass all laws which it is not, expressly or by necessary implication, prohibited from passing by the constitution of the state or the United States; and it is not necessary, in the case now before the court, that we should question the existence of this power in the legislative department, though exercised against natural justice, or subversive of first principles.

The preamble to the constitution of this state declares the purpose of the people, in convention assembled, to be, in the ordaining of a constitution for their government, to secure to them and their posterity the enjoyment of all the rights of life, liberty, and property, and the free pursuit of happiness. The first section of the declaration of rights is, that all men, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness. And it is further declared that no man shall be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property but by the judgment of his peers, or the law of the land. The last section declares that the enumeration of rights therein contained shall not be construed to deny or disparage others retained by the people.

Now we feel it our duty to express the opinion we entertain, that the prohibition upon the power of the legislature to take private property for public use without providing for just compensation to be first made to the owner is necessarily implied in the articles above quoted. The right of the citizen to acquire, possess, and protect property thus guaranteed to all by the fundamental law, being a limitation imposed by the people upon the government of their own creation, and designed to

protect the weak against the strong, the minority against the majority, would be of little avail and but an empty sound if the legislative department possesses the power to divest him of it without adequate compensation, through caprice, or even in the exercise of honest but misguided judgment, or upon that most dangerous of all pretenses, for state reasons, and the policy of promoting what may be deemed the public good.

In *Fletcher v. Peck*, 6 Cranch, 87, the question was whether a grant from the legislature of Georgia, conceding it to have been obtained by fraud, could be annulled by a subsequent legislature so as to divest the title of an innocent purchaser who had acquired title from the original grantee without notice of the fraud alleged to have been practiced upon the state. Although Chief Justice Marshall, in that case, rests his decision mainly upon the ground that the law in question was one impairing the obligation of contracts, inasmuch as, upon a fair interpretation of that clause of the federal constitution, a contract executed or an estate vested was as well embraced in the prohibition as a contract executory or in action, yet in considering the extent of legislative power, he said: "If the legislature feel itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands if it shall be the will of the legislature so to exert it." And he said again: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found if the property of an individual fairly and honestly acquired may be seized without compensation?" To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious consideration. It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been and perhaps never can be definitely settled."

In view of the distinction between the departments of the state governments repeatedly recognized and enforced by this

court, the power of the government being divided by the constitution into three distinct departments, legislative, executive, and judicial, and confided to separate bodies of magistracy, we are not called upon here to determine whether, if by law compensation be provided to the owner of property taken against his will for public use, the administration of the law in ascertaining and decreeing the amount of compensation does not appropriately belong to the judicial department. The question here is not as to the mode of making the compensation, but as to the power of withholding it.

The case of *Gardner v. Newburgh*, 2 Johns. Ch. 162 [7 Am. Dec. 526], was a bill to restrain trustees under an act of the legislature of New York, authorizing the construction of certain water-works. The act made provision for compensating the owners of the spring from whence the water was to be derived, and also the owners of land through which the aqueduct would pass, but made or contemplated no provision for compensating the complainant, who was the owner of land through which the water had been accustomed to run, off the line of the proposed aqueduct, which would divert the water used by him for turning machinery. Chancellor Kent, admitting the right of eminent domain, said: "But to render the exercise of the power valid, a fair compensation must in all cases be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice." And he cites Grotius, Puffendorff, and Bynkershoeck to prove it to be a clear principle of natural equity, that the individual whose property is sacrificed for public uses must be indemnified, and quotes from Blackstone's commentaries on the law of England to show that the sense and practice of the English government are equally explicit on this subject. Chancellor Kent fortifies his opinion by reference to the constitutions of some of the other states, where this principle of the inviolability of private property, even as it respects the acts and wants of the state, unless a just indemnity be afforded, had been made an express and fundamental article of right in their constitution of government, and more especially by reference to the clause of the federal constitution, "that private property shall not be taken for public use without just compensation," as decisive of the

sense of the people of this country. And he says: "I feel myself, therefore, not only authorized, but bound to conclude that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property." And, as it would seem, in accordance with the opinion of Chancellor Kent, a clause to that effect was expressly ordained in the constitution of New York, subsequently adopted.

In the case of *Crenshaw v. The Slate River Company*, 6 Rand. 245, the constitutionality of an act of the legislature of Virginia was called in question, arising out of a contest between the company incorporated for the purpose of opening the navigation of the river and the owners of mills who had erected dams across it. The court, delivering their opinions *seriatim*, held the act of the legislature to be unconstitutional: Judge Carr considering it so when tested by the principles of all civilized governments; Judge Green was of opinion that the owners of the property were not aided by the clause of the federal constitution inhibiting the states from passing any law impairing the obligation of contracts, because, though liberally construed, it had never been extended to the protection of private rights acquired under the protection of the general laws of the state, and without any consideration given, which would make their protection obligatory upon the state as a contracting party. And although he conceded that the legislature had all the powers of sovereignty, except so far as they are limited by the constitutions of Virginia and the United States, he held the law to be unconstitutional, because of the clause in the Virginia bill of rights, which declares "that all men are by nature free and independent, and have certain inherent rights of which, when they enter into a state of society, they can not by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." And of this he said: "To deprive a citizen of any property already acquired, without a fair compensation, deprives him *quoad hoc* of the means of possessing property, and of the only means, so far as the government is concerned, besides the security of his person, of obtaining happiness. Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals; and this security of private property is one of the primary objects of civil government, which our ancestors, in framing our constitution, intended to

secure to themselves and their posterity effectually and forever."

In the case of *Bristol v. New Chester*, 3 N. H. 534, this question was considered by the court as incidentally involved. The court there held, in the absence of any such provision in the constitution of that state, that, where private property is taken for public use, a just compensation is to be made. In the language of that court: "The constitutions of some of the states expressly declare that such compensation shall be made; and natural justice speaks on this point where our constitution is silent."

If the acts of assembly for reclaiming the swamp lands provided for compensation to those whose property might be injured or taken for public use by the levees or drains contemplated by those acts, the parties now seeking relief could not be heard, except to complain in respect of the due and just administration of the law awarding compensation. And although we will not conclude that, in passing those acts, the legislature intended to take private property for public use without just compensation, but must suppose that if such injury to private rights had been anticipated, it would have been provided for, and some mode of compensation established by law, yet, in the absence of such provision, there can be no doubt, upon the facts presented, of the jurisdiction of chancery, and the court will not hesitate to exercise it to protect the rights of the citizens, because the work is a public one, and the defendants are acting as agents for the state. If acting within the scope of their authority, a suit against the commissioners is virtually a suit against the state. Yet, as they defend under the law and their authority, the state is not a necessary party, and even if made a party, it might be that the only way to afford effectually the relief sought would be to enjoin her agents or officers.

Where the rights of the individual claiming to be injured are not concluded by a just compensation awarded for the loss or injury to his property, the agents of the state are liable in damages for the trespass or waste committed; and where this amounts to a nuisance liable to continue, or the damages from it are likely to be irreparable, an injunction may be granted to restrain the act complained of, or by decree the nuisance, if erected, may be abated. This jurisdiction is one inherent in the powers of a court of chancery.

But it ought to be exercised with caution. Where the undertaking is of a public nature, or where great expense has been

incurred, if of a private nature, an injunction to stop it will not be granted without a reasonable notice to the defendant; and then the chancellor may well hear affidavits in support or denial of the allegations of the bill. See the remarks of Lord Eldon, in *Crowder v. Tinkler*, 19 Ves. 622. Of course, in cases where the injury may be immediate and destructive, and thus irreparable, or where the giving of the notice might precipitate the act sought to be enjoined, no notice of an application for special injunction ought to be required. But this is not such a case. Here the injury may only be temporary, and the levee, even if completed, may, if the case made out require it, be opened and the nuisance abated.

The chancellor, upon the facts alleged or shown, may mold the temporary as he would the final relief, granting less than the prayer, and within its scope. Here he might order that the defendants desist unless, within a reasonable time to be allowed, they would put a suitable culvert in the bayou; and from the affidavits adduced on the application, he could ascertain, with reasonable certainty, the amount of damages that might result to the defendants from the granting of the injunction, and so fix the amount of the bond to be given by the complainants, and prescribe its conditions to meet all the exigencies of the particular case.

We are not insensible to the responsibility that might thus devolve upon the chancellor in the exercise of his judicial discretion. To open, or require to be kept open, a gap in the connection of a system of levees along the banks of one of our large rivers might occasion wide-spread injury or ruin to a great number of individuals, whose loss, compared with the injury or nuisance complained of, would make it appear trifling and inconsiderable. Although, under peculiar circumstances, the existence of such a *vis major* or inevitable necessity would require the destruction of one man's property in order to preserve that of others, yet, when the right of the complainant is clear and the threatened loss or injury to his property is manifest, the courts are bound to afford him the protection of the paramount law requiring a just compensation to be made before his property shall be taken for public use.

The bill in this case, taken most strongly against the pleader, concedes that the levee is being constructed with the consent of the complainants, and that it will be, if properly constructed, of benefit to them. And the gist of the complaint is the want of a suitable culvert to permit the usual flow of water from the

bayou into the river and to shut out the overflow from the river when required. The complainants allege that they were authorized by the commissioners, in October last, to procure and put in the bayou, where the levee crossed it, a suitable iron culvert. We may and ought to suppose, in the absence of any showing to the contrary, that sufficient time elapsed to enable them to procure this culvert; and if so, the injunction was properly refused.

Upon the whole bill, as presented, and without any notice of the application being given to the defendants interested, we will not grant the *mandamus* asked for; but we have thought it proper, in stating the reasons for our opinion, to indicate, with some degree of certainty, what the action of the chancellor ought to be, in case the complainants shall deem it necessary, for the protection of their rights, to present their application anew.

The petitioners presented their applications anew to the chancellor; and upon his refusal to grant an injunction, again applied for a writ of *mandamus*, which was awarded by the chief justice in the recess of the court.

INJUNCTION IS NOT TO BE GRANTED UNLESS REMEDY AT LAW IS INADEQUATE: See *White v. Flannigain*, 54 Am. Dec. 668, and note; *Lyon v. Hunt*, 46 Id. 216; *Brown v. Huff*, 28 Id. 425; *Fentress v. Robins*, 7 Id. 704; *Lining v. Geddes*, 16 Id. 606.

INJUNCTION WILL NOT BE GRANTED WHERE RIGHT IS DOUBTFUL: *Roath v. Driscoll*, 52 Am. Dec. 352, and note citing prior cases.

INJUNCTION AGAINST PUBLIC IMPROVEMENTS will not be granted on the ground of the loss of business or profits to a few persons: *Lexington & O. R. R. Co. v. Applegate*, 33 Am. Dec. 497.

CONSTITUTIONAL RIGHT TO COMPENSATION for private property taken for public use: See *Radcliff v. Mayor etc. of Brooklyn*, 53 Am. Dec. 357, and note on consequential injuries through work authorized by law; *Alexander v. Mayor*, 46 Id. 630; *Foot v. Cincinnati*, 38 Id. 737; *Thompson v. Grand Gulf R. & B. Co.*, 34 Id. 81; *Lexington & O. R. R. Co. v. Applegate*, 33 Id. 497; *Cochran v. Van Surlay*, 32 Id. 570; *Bloodgood v. M. & H. R. R. Co.*, 31 Id. 313, and extensive note discussing the subject.

LARY v. YOUNG.

[13 ARKANSAS, 401.]

INDORSER MAY WAIVE PRESENTMENT AND NOTICE BY PROMISE TO PAY NOTE, made either before or after its maturity.

STRONGER CIRCUMSTANCES WILL BE REQUIRED TO JUSTIFY INFERENCE OF WAIVER BY INDORSER of due demand and notice, where promise to pay is made after the maturity of the note than where it is made prior to the maturity.

PROMISE BY INDORSER TO PAY NOTE NEED NOT BE EXPRESS in order to constitute waiver of demand and notice; but it will be sufficient if by reasonable intendment the language implies a promise to pay it.

PROMISE BY INDORSER TO PAY NOTE IS WAIVER OF DEMAND AND NOTICE, though conditional as to the mode of payment.

WHETHER FACTS AND CIRCUMSTANCES SHOWN BY EVIDENCE AMOUNT TO WAIVER by indorser of demand and notice is a matter of fact to be determined by the jury.

WAIVER OF DEMAND AND NOTICE BY INDORSER IS SUFFICIENTLY ESTABLISHED BY EVIDENCE that upon being reminded by the indorser's attorney shortly before the maturity of the note of the approaching maturity, and the absence of the makers, the indorser replied that he owed the note, that it was all right, that he had indorsed it to pay it, and that if he was not there to pay it when it became due, his agent, who was present at the conversation, would do so, the latter having notes and accounts of the indorser's in his hands.

APPEAL from the Calhoun circuit court. The opinion states the case.

Gallagher, for the appellant.

By Court, Scott, J. This action was to charge the indorser of a promissory note. The first count was the usual one. The second set up a promise after maturity, the defendant then well knowing that the note had not been duly presented to the maker. To these were added counts for money lent and for money paid. The plea was *non assumpsit*, and the issue upon it submitted to the court as to a jury by consent. Upon the evidence the court found for the plaintiff, and rendered judgment accordingly; from which the defendant appealed, having first moved for a new trial, which was overruled, to which he excepted, and in his bill of exceptions set out all the evidence.

The question in this case is, whether or not there was a waiver of demand and notice.

It appears that the defendant resided some distance from Camden, where the makers lived, and where the note was executed; that he had regularly indorsed the note some time before its maturity, and that it was in the hands of the plaintiff's attorney in Camden; that a few days before the maturity of the note the defendant happened in Camden; that the plaintiff's attorney, telling him that he had the note, reminded him that it would be due in a few days, and that the makers had left the place. To this the defendant replied, that "he owed the note, that it was all right, that he had indorsed it to pay it, and that if he was not there to pay it when it became due, that

his agent (Hugh W. Ashley, who was also present at the conversation) would do so, he (Ashley) having notes and accounts of defendant's in his hands." To this, Ashley, upon being addressed by the plaintiff's attorney, replied that he would pay the notes when he should have collected money out of the notes and accounts of the defendant. To which, addressing the defendant, the attorney remarked to him that if the agent Ashley should pay the note by the first of February then next following, he would give indulgence until that time. That about the tenth of February the plaintiff's attorney applied to Ashley for the money, who replied that he had then no money in his hands belonging to the defendant; that he had had one hundred dollars, but the defendant had come over and drawn it out. Ashley was also examined as a witness, and the only discrepancy between his testimony and that of the witness is as to one of the particulars of the interview at Camden, he testifying that on that occasion the defendant said "he intended to pay the note, and that he (meaning the witness) had notes and assets on hand belonging to him (the defendant), and that he would pay it out of them."

The general rule applicable to the case before us is this, expressed by Judge Story in his work on promissory notes: "The commercial law having required due presentment and due notice of the dishonor of a note, as conditions attached to the obligation of the indorser, these acts are ordinarily deemed indispensable to be performed before the indorser is charged with absolute responsibility. Still, however, the doctrine is subject to equitable exceptions and reasonable qualifications, whenever circumstances absolutely prevent a due compliance therewith, or the holder has a reasonable excuse for his non-compliance, or the indorser, by his acts or language, has dispensed with strict compliance, or he has, upon full knowledge of all the circumstances, waived his strict rights as to due presentment and notice:" Story on Prom. Notes, 456, sec. 368. He also says that in cases where the promise to pay is made after the maturity of the note, stronger circumstances will be required to justify the inference of a waiver of the want of due demand and notice than in cases of a promise made prior to the maturity: Id. 322, sec. 280. And as to what shall be a sufficient proof of waiver, he says: "It is not necessary that an express promise should be made absolutely to pay the note in *totidem verbis*. It will be sufficient if, by reasonable intentment and interpretation, the language imports or naturally im-

plies a promise to pay it:" Id. 451, sec. 364. And Mr. Greenleaf, in his work on evidence, laying down the law in the same way, adds, upon numerous authorities, which he cites to sustain the law as he states it, that such a promise (express or implied) will be sufficient "even although conditional as to the mode of payment:" 2 Greenl. Ev. 183, sec. 190.

In the case of *Union Bank of Georgetown v. Magruder*, 7 Pet. 287, the supreme court of the United States held that the question whether or not the facts and circumstances shown by the evidence amount to a waiver is not a matter of law, but a matter of fact, to be determined by the jury. This was the only question decided in the case.

In the light of these authorities, the case at bar is perfectly clear. There is abundant testimony to sustain the finding of the court sitting as a jury, that there was a waiver of demand and notice. Indeed, it is a much stronger case than several that have been adjudged in courts of the highest authority, as where the indorser said to the holder, before maturity, "that he would pay the note if at maturity it were not paid by any other party:" *Boyd v. Cleveland*, 4 Pick. 525. So where before maturity the indorser told the holder of the note "to give himself no uneasiness about it, he would see him paid." So, also, in cases after maturity where the indorser has had full knowledge of all the facts touching his rights, his declaration that "he would see the note paid" has been held sufficient proof of his waiver of notice; and so an acknowledgement that "it must be paid," and of a promise that "he would set the matter to rights:" Story on Prom. Notes, 451, sec. 364, and cases there cited in note 1.

Finding no error in the record, the judgment must be affirmed, and we shall award to the plaintiff below ten per cent damages upon the judgment in the circuit court in his favor.

PROMISE BY INDORSER TO PAY NOTE MADE WITH KNOWLEDGE of the failure of the holder to make due demand and to give due notice is a waiver of demand and notice: *Wilson v. Huston*, 53 Am. Dec. 138; *Schmidt v. Radcliffe*, Id. 678, and notes citing prior cases.

PAROL EVIDENCE OF WAIVER OF DEMAND AND NOTICE BY INDORSER IS ADMISSIBLE, and waiver need not be express: *Fuller v. McDonald*, 23 Am. Dec. 499. See *contra*, *Piscataqua Exch. Bank v. Carter*, 51 Id. 217.

WHAT FACTS AMOUNT TO WAIVER OF NOTICE BY INDORSER is held, in *Wilson v. Huston*, 53 Am. Dec. 138, to be a question of law for the court.

WRIGHT v. YELL.

[18 ARKANSAS, 503.]

JUDGMENT ON FORFEITED DELIVERY BOND IS NOT VOID because actual notice has not been given the securities therein.

LEGAL EFFECT OF JUDGMENT ON FORFEITED DELIVERY BOND is a satisfaction and discharge of the original judgment while the second judgment remains in force.

VENDITIONI EXPONAS ISSUED ON ORIGINAL JUDGMENT AFTER JUDGMENT ON DELIVERY BOND is nugatory.

SURETY ON DELIVERY BOND HAS NO RIGHT TO COMPLAIN that judgment creditor ordered the return of a *venditioni exponas* issued on the original judgment after judgment rendered on the delivery bond, for his liability as surety was neither increased nor diminished thereby.

JUDGMENT MAY BE ASSIGNED LIKE CHOSE IN ACTION: *Clark v. Moss*, 11 Ark. 736.

MERE DELAY BY ASSIGNEE OF JUDGMENT ON DELIVERY BOND to sue out process after assignment will not discharge the surety on the bond unless the delay is by contract upon sufficient consideration without the surety's consent.

BILL for injunction, in which James Yell, Valentine Sevier, and others were complainants, and William Wright and others defendants. Final decree was rendered for the complainants, and Wright appealed. The attorneys for the plaintiff in the judgment, included in the present controversy, assigned it to Wright for the expressed consideration of the payment to them by Wright of the balance due on the judgment. The case is otherwise sufficiently stated in the opinion.

Fowler, for the appellant.

By Court, WALKER, J. Steward, for the use of Chapman, recovered judgment against Ambrose H. Sevier, in the circuit court of Jefferson county; on which judgment a writ of *fi. fa.* issued, and was levied on the slaves of Sevier, who gave bond to the sheriff for the delivery of the slaves on the day appointed for their sale, with the complainants as his securities. Sevier failed to deliver the slaves, the bond was returned by the sheriff as forfeited, and on motion of the plaintiff in execution, judgment was rendered against Sevier and his securities for the damages sustained by reason of the breach of covenant to deliver the property in execution on the day of sale.

After the judgment on the delivery bond, a writ of *venditioni exponas* issued on the original judgment, reciting the levy on the slaves, and directing the sheriff to expose them to sale. This writ was, however, recalled without action on the part of the

sheriff. And after an assignment of the judgment to the appellant, a writ of *fi. fa.* issued on the judgment rendered upon the delivery bond; to enjoin which this suit is brought.

The first ground for equitable relief seems to have been taken under a misapprehension of the legal effect of the judgment on the delivery bond. The judgment was not void, because actual notice had not been given to the securities: *Ruddell v. Magruder*, 11 Ark. 584; *Borden v. State*, Id. 519 [54 Am. Dec. 217]. And the legal effect of the judgment was to satisfy and discharge the original judgment: *Whiting v. Beebe*, 12 Id. 548. And in the case of *Witherspoon v. Spring*, 3 How. (Miss.) 60 [32 Am. Dec. 310], it was held that a second execution and levy on the original judgment are void; and Chief Justice Sharkey, in the case of *McNutt v. Wilcox*, Id. 419, gives as a reason for the rule that the plaintiff is not entitled to two subsisting judgments on the same cause of action against the same parties.

When, therefore, judgment was taken upon the delivery bond, its legal effect was to supersede the original judgment, and to satisfy and discharge it whilst the second judgment remained in force. The writ of *venditioni exponas*, which issued on the original judgment, after the judgment on the delivery bond, imposed no obligation on the sheriff to execute it, created and imposed no liability or restriction upon Sevier's property; and as none was created, none was discharged by the order to return the writ, which was properly made to prevent a trespass upon the property of Sevier. Of this the surety had no right to complain, as his liability as such was neither increased nor diminished by the proceeding upon the first judgment.

The second ground of equity relied upon is, that the judgment upon the delivery bond was in fact paid by Sevier, although part of the sum was paid by Wright for Sevier. The answer positively denies the truth of this allegation; but, on the contrary, asserts that the judgment was purchased by Wright for himself. He admits, however, that Sevier wrote to him requesting him to purchase the judgment, or take other steps to prevent his (Sevier's) property from being sold; and when we see that he paid the full amount of the residue of the judgment for it, and delayed process for several months, we can not doubt that Wright made the purchase, not for speculation, but to oblige Sevier. He could do this consistently with a purchase for himself, which his answer positively states, and against which there is no evidence, except the inference to be

drawn from the letter written by Sevier to him, and the price given for the judgment.

The assignment of the judgment was sufficient: *Clark v. Moss*, 11 Ark. 736. And mere delay to sue out process after the assignment will not discharge the surety: *King v. Baldwin*, 2 Johns. Ch. 558; unless the delay is by contract upon sufficient consideration without the assent of the surety: *Stone v. State Bank*, 8 Ark. 141; *Caldwell v. McVicar*, 9 Id. 422. In this case, it is not pretended that any contract for delay was made, unless it could be shown that the purchase of the judgment was, in fact, a purchase by Sevier (which we have seen is not done); and even then it could only by inference be made a contract for further time.

Wherefore, in consideration of the whole case, we think the circuit court erred in decreeing a perpetual injunction of the judgment at law. Let the decree be set aside and reversed, the injunction dissolved, and the bill dismissed with costs.

JUDGMENT ON FORFEITED DELIVERY BOND, EFFECT OF: See note to *Trapnall v. Richardson*, *post*, p. 355, under the head "Levy produces no satisfaction when removed from plaintiff's possession by legal process." See also *Cole v. Robertson*, 55 Am. Dec. 784; *Coffee v. Planters' Bank*, 49 Id. 68.

SURETY IS NOT DISCHARGED BY MERE FORBEARANCE: *Marberger v. Pott*, 55 Am. Dec. 479, and prior cases cited in the note. The principal case is cited to this effect in *Thompson v. Robinson*, 34 Ark. 52. As to the effect on the surety of forbearance in enforcing a forthcoming bond, see *McGee v. Metcalf*, 51 Am. Dec. 122, and note.

ASSIGNEE OF JUDGMENT TAKES IT SUBJECT TO ALL EQUITIES between the original parties: *McSilton v. Love*, 55 Am. Dec. 449, and note citing prior cases.

ASSIGNABILITY OF JUDGMENTS: See *Duncan v. Bloomstock*, 13 Am. Dec. 728, and note.

JUDGMENT ON DELIVERY BOND ENTERED WITHOUT NOTICE: See *Danley v. Rector*, 50 Am. Dec. 242, and note.

TRAPNALL v. RICHARDSON, WATERMAN & Co.

[13 ARKANSAS, 543.]

JUDGMENT LIEN IS PARAMOUNT TO JUNIOR MORTGAGE LIEN.

LIEN OF JUDGMENT IN FEDERAL COURT IS, BY ANALOGY TO STATE LAWS, Co-EXTENSIVE with the territorial jurisdiction of the court.

LEVY ON LAND IS NOT SATISFACTION OF JUDGMENT, and judgment lien continues unbroken.

JUDGMENT CREDITOR MAY NOT ABANDON VALID SUBSISTING LEVY ON LAND against the will of the debtor and tax him with the costs of further execution; and on the latter's application, the duty of the court whence the *alias* process is so irregularly issued is to quash or recall it.

PLAINTIFF MUST EXHAUST PREVIOUS LEVY BY SALE before he can resort to other property of the defendant.

LEVY ON PART OF DEFENDANT'S LANDS DOES NOT POSTPONE JUDGMENT LIEN upon other lands to a junior mortgage thereon.

SUBSISTING LEVY ON LAND IS NO BAR TO SCIRE FACIAS on judgment to continue its lien or to substitute a representative of either party.

LEVY ON PERSONAL PROPERTY IS SATISFACTION OF JUDGMENT while property remains in legal custody, but not when the property is restored to the debtor or in any manner gets back to his possession, or where the levy, being exhausted by sale, fails to produce satisfaction.

LEVY EXHAUSTED BY SALE IS SATISFACTION PRO TANTO, and execution will issue for the residue, if any remain.

LEVY OF EXECUTION DURING CONTINUANCE OF JUDGMENT LIEN WILL NOT CONTINUE LIEN beyond the statutory period, and a sale under a *venditioni exponas* issued after the expiration of the judgment lien, without any *scire facias* having been issued to keep it alive, is invalid against a junior mortgage.

APPEAL from the Jefferson circuit court. The opinion states the case.

F. W. and P. Trapnall, for the appellant.

Pike and Cummins, for the appellees.

By Court, WATKINS, C. J. This was a bill in chancery, by the appellees, to foreclose a mortgage executed to them by De Baun and wife, to secure the payment of a debt due to them by De Baun—to which the appellant was made a party defendant, upon the allegation that he claimed some title to the lands mortgaged, and he by his answer asserted title in himself superior to the mortgage by his purchase of the land under a prior judgment.

The mortgage was executed, acknowledged, and recorded on the first of June, 1842, upon the west half of section 25, in township 6 south, range 8 west—three hundred and twenty acres; and the west half of the north-east quarter of section 14, in township 6 south, range 9 west—eighty acres, all in Jefferson county.

On the twenty-fifth of May, 1842, Louis Chittenden recovered judgment against De Baun, in an action of debt in the circuit court of the United States for this district. Execution issued on this judgment on the eighth of June, 1842, and was levied on various tracts of land in Pulaski county, which were advertised and sold.

On the twenty-fourth of March, 1848, an *alias* execution was issued, and was returned levied on two tracts of land in Jefferson county, but not in time to advertise and sell, one of them being the south-west quarter of section 25, in township 6

south, range 8 west—one hundred and sixty acres, a part of one of the tracts embraced in the mortgage, upon which a *venditioni exponas* issued on the twenty-sixth of May, 1843, and sale was made by Newton, as marshal, on the ninth of October, 1843, at which the appellant became the purchaser, and the two tracts last referred to were conveyed to him by Rector, as marshal, the successor of Newton, by deed duly acknowledged and recorded.

On the eleventh of December, 1843, a *pluries* execution issued, and was levied on various tracts of land in Saline county, which were sold, and was also levied on the north-west quarter of section 25, in township 6 south, of range 8 west—one hundred and sixty acres; and the north-east quarter of section 14, in township 6 south, of range 9 west, being the residue of the lands included in the mortgage, as to which the marshal returned that they were not sold at the instance of the plaintiff's attorneys, in consequence of an alleged error in the advertisement; and on the nineteenth of September, 1849, a *venditioni* issued for the sale of the two last-mentioned tracts, which were sold under it, and purchased by the appellant on the fourteenth of October, 1844, and conveyed to him by marshal's deed on the thirtieth of April, 1845, acknowledged, and recorded.

On the twenty-fourth of June, 1846, Chittenden filed his motion, in the circuit court of the United States, to have the sale made by Newton, marshal, under the *vend. ex.* on the ninth of October, 1843, set aside, and that the deed executed in pursuance of that sale be canceled and vacated, because the sale under the *vend. ex.* was made by Newton, as marshal, after he had been removed from office, and that another *vend. ex.* be issued; which motion was granted, vacating the sale and the deed made pursuant to it, and the *vend. ex.* issued on the sixth of April, 1846, reciting the issuance of execution on the twenty-fourth of March, 1843, the levy on the south-west quarter of section 25, etc., the return that it was unsold for want of time, etc., and requiring the same to be sold. Under this *vend. ex.* the south-west quarter of section 25 was sold on the twelfth of October, 1846, and purchased by the appellant and conveyed to him by marshal's deed on the thirtieth of March, 1847, acknowledged, and recorded.

All of the sales under these successive executions failed to satisfy the judgment.

On the final hearing, the court below decreed that as to the lands embraced in the mortgage the judgment should be post-

poned to the mortgage, and a decree of foreclosure was made accordingly, from which the defendant, Trapnall, appealed.

The case of *The Trustees R. E. Bank v. Watson*, 13 Ark. 74, decided at January term, 1852, is a conclusive adjudication as to the priority of the judgment lien over that of the mortgage, the latter being junior in time; and the law must now be regarded as well settled that the lien of a judgment in the federal court is, by analogy to the state laws, co-extensive with the territorial jurisdiction of the court. See *Byers v. Fowler*, 12 Id. 218 [54 Am. Dec. 271], and cases there cited.

But the appellees contend that the levy on land under the first execution was a satisfaction of the judgment, and so postponed it to the mortgage; and the cases of *Anderson v. Fowler*, 8 Ark. 388, and *Anthony v. Humphries*, 9 Id. 176, are relied upon as decisive of this question, adhered to, as they are supposed to be, by the case of *Whiting v. Beebe*, 12 Id. 421. *Anderson v. Fowler* was a motion to recall a *supersedeas* granted by a judge of this court to an execution upon a judgment of allowance against an administrator in the probate court. The ground of the application for *supersedeas* was, that a former execution upon the same judgment had been issued, levied on lands of the administrator, and returned without sale by order of the plaintiff, and that without disposing of the former levy the plaintiff had caused an *alias fi. fa.* to be issued, under which personal property of the administrator had been seized in execution. Without entering into the reasons given by the court, Oldham, J., dissenting, the motion to recall the *supersedeas* was refused. *Anthony v. Humphries* was a *sci. fa.* to revive a judgment, to which the defendant pleaded in bar of the action a subsisting levy on lands of the defendant, of sufficient value to satisfy the judgment, whereby it was in law satisfied. Upon demurrer to this plea, the defendant in the court below had judgment, which was affirmed in this court, upon the authority of *Anderson v. Fowler*, there adhered to as having decided the question, and it was thus disposed of without further consideration. In *Whiting v. Beebe*, although the case of *Anderson v. Fowler* is approved and confirmed, the court lay down the rule to be that "a mere levy on sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. But so long as the property remains in legal custody, the other remedies of the creditor will be suspended. He can not have a new execution against the person or property of the debtor, nor maintain an action on the judgment," etc.; and certainly, while,

as the court there say, this rule is settled by authority, it is as far as any court has gone, and comes up to the cases of *The People v. Hopson*, 1 Denio, 574, and *Green v. Burke*, 23 Wend. 501. The difficulty would seem to be in the application of the rule under consideration.

Without entering into a discussion of the difference between a levy on land and a levy on goods, as insisted upon by the appellant, a mere levy on lands would not in any case work an absolute satisfaction of the judgment. By our statute, the judgment debtor has the right to select of his property what shall be levied on, and the sheriff is bound to take it, if in his judgment sufficient; so also the debtor may direct the order in which he wishes his property levied on to be sold. These provisions of the statute are designed, like the so-called satisfaction by levy, as a protection to the debtor, and being for his advantage, he may waive it. The intent of the law is that the creditor, having a levy presumed in the absence of any proof to the contrary to be sufficient, shall not capriciously abandon it, and so harass the debtor by a further levy against his will. To allow this, where the levy is of personal property seized and taken out of the debtor's possession, might be in a high degree oppressive, since, by being deprived of the use of the property, he is to that extent deprived of the means of paying the debt.

Supposing a levy on land to be the same in effect as a levy on goods, so that in either case the plaintiff should fairly exhaust it, the result of the decision in *Anderson v. Fowler* was right, though unnecessarily treated as a satisfaction. That case was nothing more than an application to supersede an *alias fi. fa.*; and though the relief would more appropriately have been sought in the court from whence the process issued to quash or supersede it, as having been illegally or improvidently issued, the effect of the decision was merely to require the plaintiff to exhaust the previous levy by *vend. ex.* before he could resort to other property of the defendant.

The difficulty of reconciling the case of *Anthony v. Humphries* with what the court understand to be law consists in this: there the levy on land was pleaded as a satisfaction and in bar of the action, terms which ordinarily and in legal contemplation imply an extinguishment of the judgment; a bar to the right, and not merely a suspension of the remedy. The proceeding there was a *scire facias* to revive a judgment and continue the lien, which, though in *Brown v. Byrd*, 10 Ark. 534, was considered to be a suit where defendant had day in court and could plead and bring error,

yet it was in the nature of process of the original action, not a new action, but a continuation of the old one. The judgment is not that the plaintiff recover, but that he have execution according to the form and effect of the original recovery. Where the plaintiff wishes to continue the lien of the judgment, or if either plaintiff or defendant dies, so that a representative is brought in, the object of the *scire facias* is to enable the plaintiff to have execution effectually of his judgment, and to dispose, if need be, of the subsisting levy. But this object is defeated if the defendant be admitted to plead the levy in bar of the action.

The law is understood by the court to be that a levy on personal property is a satisfaction while the property remains in legal custody, but is not a satisfaction where the property is restored to the debtor, or in any manner gets back to his possession, or where the levy, being exhausted by sale, fails to produce satisfaction. In any such case, the plaintiff is entitled to have further execution; and where the levy has been exhausted by sale, it is a satisfaction *pro tanto*, and execution will be had for the residue. A levy on land is not an absolute satisfaction and can not be pleaded as such; but the plaintiff having a valid subsisting levy on land may not abandon it against the will of the debtor and tax him with the costs of further execution, and on his application it would be the duty of the court from whence the *alias* process is so irregularly issued to quash or recall it.

In the case now under consideration, the successive levies were exhausted by sale, the aggregate of the sales failing to produce satisfaction of the judgment. If there had been an actual satisfaction by payment or by sale of property not included in the mortgage, the appellees claiming under the mortgage would be entitled to the benefit of such satisfaction. But such would not be the effect of a mere levy on land. Even if the creditor, and not the debtor, had the election as to what property would be levied on, it would be inequitable to hold him bound by that election as a postponement of the lien of his judgment, if, from a mistaken notion of the value of the property, or any other cause, he failed to have a levy sufficient to produce actual satisfaction. While the levy remains undisposed of, his right to a further levy may be suspended, but the lien of the judgment continues unbroken. It would seem that the provisions of our statute, title Judgments and Decrees, sec. 4 et seq., on that subject, are too plain to be misconceived. They are as follows:

“Judgments and decrees rendered in the circuit court shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held. Sec. 5. Liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided. Sec. 6. A sale of lands under a junior judgment shall pass the title of the defendant subject to the lien of all prior judgments and decrees then in force. Sec. 7. The money arising from the sale shall be applied to the payment of the judgment under which it may have been made.”

In the case of *Rankin v. Scott*, 12 Wheat. 177, Marshall, C. J., commenting on a statute of Missouri similar to ours, considered the statutory lien as binding as a mortgage, and has the same capacity to hold the land so long as the statute preserves it in force. He said: “The principle is believed to be universal that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution has never been considered such an act.”

In this case, so far as the mortgaged property is concerned, the judgment creditor can only be regarded as delaying to proceed against it. Surely the mortgagee can not complain that the plaintiff in the judgment endeavored first to obtain satisfaction out of other property of the debtor before resorting to that which was mortgaged. At the outset, the only remedy the mortgagee could have had was by injunction upon the bill alleging that the debtor had other property bound by the general lien of the judgment sufficient to satisfy it, to compel the creditor to sell the other property to which the lien of the mortgage did not extend before resorting to the land bound by the mortgage; as in the case where there is a prior lien upon two funds, and a junior lien attaching to but one of them. Here the judgment creditor appears to have done all that the mortgagee could have required him to do. With the plain provisions of the statute staring him in the face, the junior incumbrancer can do one of two things: he can either pay off and acquire the prior incumbrance, or he can sell, or foreclose and sell subject to it. These expressions are of course in general terms, and supposing the given case to be free from fraud or collusion, which is not here alleged to exist.

But another question arises in this case, which is supposed by the appellant to be decided by the case of *Trustees v. Watson*, 13 Ark. 74, at January term, 1852; that is, whether the levy before the expiration of the three years from the date of the judgment will continue the lien beyond the three years. It was held in that case that such would be the effect of the levy. The facts of that case, so far as material to this question, were, that before the expiration of the lien the plaintiff sued out execution, which was levied on land bound by the lien of the judgment, but the sale which took place on the first day of the return term of the execution was after the expiration of the three years, and when the lien of the judgment had ceased.

In this case, one of the tracts included in the mortgage, being the south-west quarter of section 25, was levied upon and sold by *vend. ex.* on the ninth of October, 1843, and during the existence of the judgment lien. But on the twenty-fourth of June, 1846, and after the lien had expired, the sale made under that *vend. ex.* was set aside, the deed canceled, and an *alias vend. ex.* issued by order of the court: under this *alias vend. ex.* the tract in question was again sold and purchased by the appellant. If this sale is to be upheld as conferring a title superior to that of the mortgage lien, it can only be because of the levy made during the continuance of the lien, and which remained undisposed of until after it had expired. We are not disposed to attach much importance to the fact that after the original levy and sale of that tract under the first *vend. ex.* the plaintiff proceeded to levy upon and sell other lands, nor to the fact—in which this case differs from the *Trustees v. Watson*—that here the second *vend. ex.* was issued after the lien had expired, and without any *scire facias* having been issued to keep it alive: though the inquiry would arise, If the levy on land has the same effect thus to continue the lien, how long will the plaintiff have, after the expiration of his judgment lien, to enforce a dormant levy by sale under execution and make it relate back to and connect with the lien?

The statute, title Judgments and Decrees, sec. 8, provides that “the plaintiff or his legal representatives may at any time before the expiration of the lien on any judgment sue out a *scire facias* to revive the same,” and after providing for the mode of issuing and serving the *scire facias*, the effect of the revival is declared by section 13, as follows: “If a *scire facias* be sued out before the termination of the lien of any judgment or decree, the lien of the judgment revived shall have relation to the day

on which the *scire facias* issued; but if the lien of any judgment or decree shall have expired before suing out the *scire facias*, the judgment of revival shall only be a lien from the time of the rendition of such judgment." And so by subsequent sections the revival may be had against the representatives of a deceased defendant. These provisions of the statute were drawn in question in the case of *Hubbard v. Bolls*, 7 Ark. 442, and were construed according to their plan and obvious import, that a *scire facias* sued out after the expiration of the lien entitled the plaintiff to a revival in lieu of an action on the judgment, but the lien only attached from the date of the judgment of revival, and that where the *scire facias* is sued out before the expiration of the lien, the judgment of revival relates back to and connects with the original lien, which continues unbroken.

In the case of the *Trustees v. Watson*, the court refer to the statute of New York limiting the lien of a judgment to ten years, beyond which the lien should not be continued as connected with any subsequent revival, and concede that the difference in principle is unimportant, because under our statute if the *scire facias* be not sued out before the expiration of the three years the lien then ceases as effectually as if the law had so declared. Under the statute of New York, substantially the same as ours in giving effect to the lien of docketed judgments, only that it does not provide for reviving and continuing the lien, the courts of that state have held that a subsequent purchaser or incumbrancer is not affected by actual notice of a prior judgment, as he would be of a prior sale or incumbrance by deed or mortgage, and there can be no *mala fides* (short of actual fraud) in acquiring any right to or lien upon land bound by a judgment. The statute gives the lien and limits it to a certain number of years from the time it is docketed, and if not enforced within that time, there is an end of it, and the next oldest incumbrance in point of time is let in. That the judgment gives the lien, and the process of execution is the power or authority in the officer for enforcing it, and that the plaintiff who wishes to avoid the danger of junior incumbrances intervening must not only issue execution, but must sell within the ten years and before the lien has expired: *Little v. Harvey*, 9 Wend. 157; *Graff v. Kip*, 1 Edw. Ch. 620; *Tufts v. Tufts*, 18 Wend. 622; *Dickenson v. Gillingland*, 1 Cow. 481; *Roe v. Swart*, 5 Id. 294; *Wood v. Colvin*, 5 Hill, 228; *Mower v. Kip*, 6 Paige, 90 [29 Am. Dec. 748]; *Crosier v. Acer*, 7 Id. 140.

These cases were referred to in *Trustees v. Watson*, but the

opinion in that case, extending the lien beyond the three years by virtue of the levy, proceeds upon this reasoning: that a levy on land is a satisfaction, as held in *Anderson v. Fowler*, 8 Ark. 388, and *Whiting v. Beebe*, 12 Id. 421; that being a satisfaction, a plaintiff having a levy can not revive his judgment so as to continue the lien, as held in *Anthony v. Humphries*, 9 Id. 183, nor can he maintain any action upon the judgment; that the plaintiff, though diligently endeavoring to enforce his lien by sale within the three years, might be prevented by accidental causes, such as injunctions, failure of the courts, etc., and would be utterly remediless unless the lien be extended by virtue of the levy, which will be allowed, under such circumstances, in order to give him the benefit of the judgment lien, where the execution is strictly prosecuted and followed up to its consummation by sale. The court say that any other construction of the statute would endanger the rights of creditors, while this construction does no injury to the owner, and the issuance and levy of executions are public and notorious acts, of which all persons are required to take notice, and will purchase such property at their peril.

Now, it is incumbent on this court, and its first duty if erroneous consequences may follow from any decision made by it, to arrest them before the mischief becomes irremediable. No such inference is to be drawn from the case of *Whiting v. Beebe*, where the court, so far from holding a levy on land to be a satisfaction, say that a mere levy on personal property is not an absolute satisfaction. The cases of *Anderson v. Fowler* and *Anthony v. Humphries*, as reviewed and explained in the former part of this opinion, do not have the effect to prevent a plaintiff from having a revival of his judgment because of a subsisting levy on land. This obviates the whole difficulty, because it was in consequence of the construction put upon those decisions that the opinion in *Trustees v. Watson* was forced into an illogical train of reasoning.

It is obviously the policy of our system of laws to make the title to land depend upon matter of record, and not upon any act *in pais* or resting in parol. The registry system is almost universal. Deeds, mortgages, mechanics' liens, settlements of separate estate in the wife, and all incumbrances affecting the title to land, are required to be recorded in the county where the land lies, else they will not avail as against innocent purchasers. So judgments and decrees are required to be condensed into a judgment docket, to facilitate the examination of incumbrances

and open to the inspection of all persons interested in the title to land. The only exceptions are where the execution is levied on land to which the lien of the judgment does not extend, *i. e.*, where the execution is sent to another county, or where the lien has been determined, *i. e.*, expired without revival, and in such case the execution is the lien from the time it comes to the officer's hands, just as it is on personal property, which is never bound by the lien of the judgment: R. S., title Execution, sec. 27, and would probably have to be governed by the same rules as apply to personal property; and clearly that the sale of land so situated would not be upheld by the lien of the judgment.

But the case of *Trustees v. Watson*, if adhered to in principle, must derange the registry system and lead to controversies of a most perplexing character. As between the creditor and debtor, the lien of the judgment is of no consequence: it is only material as between creditors who have conflicting liens. To follow out the reasoning in *Trustees v. Watson*, if we admit the principle that the lien on land can be extended one day beyond the three years, there is no limit to its continuance, unless by analogy to the general statute of limitations. The court will be called on to decide the most vexed questions as to what is strict diligence, and whether it has been pursued. Indeed, the pursuit of satisfaction would be a race of diligence, and the unfortunate debtor could make no appeal to his creditor for indulgence who could not rely implicitly upon the security of his prior lien. The example given of an accidental failure of the court could not affect the question of diligence, because as to execution sales there is no failure of the court. So where the plaintiff is restrained by injunction, he is supposed to be amply protected by the injunction bond. We know that the levy of an execution on land is not a public and notorious act like the seizure of personal property, which at once arouses every one having an interest in it, and which, if adverse, is promptly asserted. Vexed questions as to the fact of levy on land would arise, depending on parol proof, and the whole policy of the registry system, designed as a most comprehensive and beneficial statute against frauds, would be disturbed. The partial evils arising from the exceptions, where the execution and not the judgment binds land, to which the lien does not extend or has been determined, must be met and considered as they arise.

But in view of the whole statute, the opinion of the court is that the judgment lien on land ought to continue just so long

as the law allows it, and no longer, else there will be no adequate protection for subsequent incumbrancers or purchasers, who on principle might well claim to be innocent purchasers as against a levy not required by law to be recorded. The plaintiff has, where his judgment is unsatisfied, a plain remedy, and that is to keep his lien alive by *scire facias*. After the revival, he can sell, and there is no lapse or break in his lien, as to which the *scire facias* operates like any other *lis pendens*; because it may happen, in some cases where the *scire facias* issued out before, the judgment of revival is not entered until after the expiration of the three years—yet the lien is unbroken.

In *Whiting v. Beebe* the title of Beebe turned on this: that the levy and sale to him under the Gray and Bouton judgment was after the three years had expired, though pending a *scire facias* to revive sued out before the three years had expired, and upon which there was afterwards a judgment of revival, which related back, so that the lien of the original judgment continued and was in fact unbroken, and if there had been a sale made under it after the revival, the purchaser would have acquired a title paramount to Whiting & Slark. But the court held, that after the expiration of the three years, and before the revival, the plaintiff, though he might issue execution and sell so as to divest the title of the defendant, yet could not have the benefit of his lien by such a sale. Because he might not pursue the *scire facias*, or he might be defeated in the attempt to revive—and even if he did revive so as to get the benefit of his lien by relation back to his original judgment, yet the pendency of the *scire facias* would not aid the sale in such case, since to give him all the benefit of this *lis pendens* under the *scire facias*, that itself implies that the suit is undetermined between him and the defendant, who may defeat a recovery as by showing payment or release. It is upon such reasoning that the point so decided in *Whiting v. Beebe* is to be upheld, and it must be regarded as a conclusive adjudication of the question now before the court. In either case, the principle is that the lien is a quality attached to the judgment, having no inherent quality to give it a preference over other claims, but is the creature of positive law, and the creditor who wishes to preserve his right to prior satisfaction, as against other creditors, must keep his lien on foot by complying with the provisions of the statute.

Probably no question could come before this court fraught with more consequences of vast importance as regulating a law of property than the one now under consideration. A forcible

illustration of this is to be found in the course of decisions in Pennsylvania, a key to which is afforded by reference to the cases of *Commonwealth v. McKisson*, 13 Serg. & R. 144; *Commonwealth v. Alexander*, 14 Id. 257; *Hurst v. Hurst*, 2 Wash. 69; *Green v. Allen*, Id. 280; *United States v. Mechanics' Bank*, Gilp. 51. There is no need to prolong this opinion by a review of those cases. The state of the law in Pennsylvania bearing upon this question will be found ably reviewed in the case of *Thompson v. Phillips*, 1 Baldw. 246, which fully upholds our construction of the law, that the lien of a judgment does not depend upon the levy. A statute like ours, plainly adhered to, would have prevented in that state a vast amount of litigation and harassing uncertainty as to a law of property extending through a period of over thirty years.

It follows, from the opinion here expressed, that the lien of the mortgage, as to the south-west quarter of section 25, in township 6 south, of range 8 west, one hundred and sixty acres, is paramount to the title set up by the appellant; that the title of the appellant to the residue of the lands included in the mortgage must prevail over the lien of the mortgage, and as to them the bill to foreclose should be dismissed, and the complainants below are entitled to a decree of foreclosure as to the south-west quarter of section 25, each party paying one half of the costs incurred in the circuit court. The appellant will recover costs in this court, and the cause is remanded to the court below, with instructions to enter a decree in accordance with this opinion.

SATISFACTION OF JUDGMENTS AND EXECUTIONS BY LEVY ON REAL OR PERSONAL PROPERTY.—The effect of a levy upon personal property of the judgment debtor, sufficient in value to satisfy the execution, has been considered by many judges as *per se* an extinguishment of the judgment, and therefore a satisfaction of the execution: *People v. Chisholm*, 8 Cal. 29; *Barber v. Reynolds*, 44 Id. 520; *Martin v. Carter*, 27 Ill. 294; *Smith v. Hughes*, 24 Id. 270; *Stewart v. Nunemaker*, 2 Ind. 47; *Barret v. Thompson*, 5 Id. 457; *Frank v. Brasket*, 44 Id. 92; *Burr v. Mendenhall*, 80 Id. 49, 51; *Blair v. Caldwell*, 3 Mo. 353; *Trigg v. Harris*, 49 Id. 176; *Ex parte Lawrence*, 4 Cow. 417; *Jackson v. Bowen*, 7 Id. 13; *Troup v. Wood*, 4 Johns. Ch. 228; *Shepard v. Rowe*, 14 Wend. 260; *Case v. Adams*, 3 Ohio, 223; *Hunt v. Breeding*, 12 Serg. & R. 37; S. C., 14 Am. Dec. 665; *Young v. Reed*, 3 Yerg. 296; *Hogshead v. Caruth*, 5 Id. 227; *Pigg v. Sparrow*, 3 Hayw. 144; *Campbell v. Pope*, Hempst. 271; *Clerk v. Withers*, 2 Ld. Raym. 1072, and *Dike's Case*, there cited. The ground upon which a levy on personalty is construed as a satisfaction of the judgment and execution while a levy on realty is not, is because in the former case the debtor may be deprived of his property by the seizure under the levy, which could not happen in the latter case, for there the debtor's possession is not interfered with, nor his

title in any way divested until sale. For this reason some of the cases classifiable with the above assert the general proposition there held with a qualification. They hold that a levy upon personal property, sufficient in value to satisfy the execution, is a satisfaction if the property be taken from the debtor's possession: *Walker v. Bradley*, 2 Ark. 578, 593; *Shepard v. Rowe*, 14 Wend. 260; *Collier v. Bank of Newbern*, 2 Dev. Eq. 525; *Cornelius v. Burford*, 28 Tex. 202; *Cravens v. Wilson*, 48 Id. 324. In *Campbell v. Carry*, 5 Harr. (Del.) 427, such a levy is said to be a payment unless it be otherwise disposed of. But none of these cases contain an accurate statement of the rule. For besides the case where the property is not taken from the debtor's possession, there are many other cases where such a levy constitutes no satisfaction of the judgment or execution. Such cases occur when the levy is overreached by a prior lien; where the levy is abandoned at the request or for the benefit of the debtor; where the levy is defeated by the fraud or misconduct of the debtor; where the levy is made unavailing by some mandate of law; or, in general, whenever the levy procures no real satisfaction through no fault of the plaintiff.

For this reason it can hardly be considered accurate to state that such a levy is *per se* an extinguishment of the judgment. It is to be considered no more than a *prima facie* satisfaction or satisfaction *sub modo*, which is liable to be rebutted by the plaintiff by various evidence showing that through no fault of himself or the sheriff the levy failed to furnish a satisfaction of the judgment and execution. This better rule is sustained not only by reason but by the weight and majority of authority in several states, later decisions having adopted this rule to the prejudice of the former rule which had been maintained by the earlier cases. Such is the case in New York and Illinois: *Newsom v. McLendon*, 6 Ga. 392; *Lynch v. Pressly*, 8 Id. 327; *Foster v. Rutherford*, 20 Id. 676; *Horn v. Ross*, Id. 210; *Chisholm v. Chittenden*, 45 Id. 213; *Oliver v. State*, 64 Id. 480; *Overby v. Hart*, 68 Id. 493; *Ambrose v. Weed*, 11 Ill. 488; *French v. Snyder*, 30 Id. 343; *Curtis v. Root*, 28 Id. 367; *Trenary v. Cheever*, 48 Id. 28; *Lucas v. Cassaday*, 2 G. Greene, 208; *Williams v. Gartrell*, 4 Id. 287; *McGinnis v. Lillard's Ex'r*, 4 Bibb, 490; *First etc. Bank v. Rogers*, 13 Minn. 407; *Bennett v. McGrade*, 15 Id. 132; *First etc. Bank v. Rogers*, 15 Id. 381; *Kershaw v. Merchants' Bank of N. Y.*, 7 How. (Miss.) 386; S. C., 40 Am. Dec. 70; *Walker v. McDowell*, 4 Smed. & M. 118; S. C., 43 Am. Dec. 476; *McNutt v. Wilcox*, 1 Freem. Ch. 116; *Bibb v. Jones*, 7 How. (Miss.) 397; *Pickens v. Marlow*, 2 Smed. & M. 428; *Banks v. Evans*, 10 Id. 35; S. C., 48 Am. Dec. 734; *Smith v. Walker*, 10 Smed. & M. 584; *Shelton v. Hamilton*, 23 Miss. 496; *Peale v. Bolton*, 24 Id. 630; *Mody v. Harper*, 28 Id. 615; *Brown v. Kidd*, 34 Id. 291; *Alexander v. Polk*, 39 Id. 737; *Wade v. Watt*, 41 Id. 248; *Folsom v. Chesley*, 2 N. H. 432; *Johnson v. Tuttle*, 9 N. J. Eq. 365; *Banta v. McClennan*, 14 Id. 120; *Carr v. Weld*, 19 Id. 319; *Hanness v. Bonnell*, 23 N. J. L. 159; *Denvrey v. Fox*, 22 Barb. 522; *Wadlell v. Elmen-dorf*, 5 Denio, 447; *People v. Hopson*, 1 Id. 574; *Taylor v. Ranney*, 4 Hill, 621; *Voorhees v. Gros*, 3 How. Pr. 262; *Green v. Burke*, 23 Wend. 490; *In the Matter of King*, 2 Dev. L. 341; *Peay v. Fleming*, 2 Hill Ch. 97; *Moore v. Kelly*, 2 McMull. 350; *Ordinary v. Spann*, 1 Rich. L. 429; *Mayson v. Irby*, Id. 435; *McElwee v. Jeffries*, 7 S. C. 228; *Charlton v. Lay*, 5 Humph. 496; *United States v. Dashiell*, 3 Wall. 688, 699.

In *Green v. Burke*, 23 Wend. 490, 501, the court says: "What, then, after all, does the rule amount to? Merely this: that the levy is a satisfaction *sub modo*. It may operate as a satisfaction and must be fairly tried; but if it fail in whole or in part, without any fault of the plaintiff, he may go to his

further execution. He must fairly exhaust the first; and while this is going on, he can neither sue on the judgment, nor have another *fi. fa.* nor a *ca. sa.*, nor can he redeem lands sold on another judgment." In *People v. Hopson*, 1 Denio, 574, 578, the court, in view of those authorities which seem to assert that the mere levy of the execution produces a satisfaction of the execution, is strenuous in the declaration that this is not so. "It is said that the levy upon sufficient personal property to pay the debt was a satisfaction of the judgment. * * * We have repeatedly held that such a levy does not always satisfy the judgment: *Green v. Burke*, 23 Wend. 490; *Ostrander v. Walter*, 2 Hill (N. Y.), 329. And if the broad ground has not yet been taken, it is time it should be asserted that a mere levy upon sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He can not have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor. But without something more than a mere levy the judgment is not extinguished. There is no foundation in reason for a different rule. The mere levy neither gives anything to the creditor nor takes anything from the debtor. It does not divest a title; it only creates a lien on the property." The judgment is satisfied to the extent of the value of the property "when the execution has been so used as to change the title, or in some other way deprive the debtor of his property. This includes the case of a levy and sale; and also the case of a loss or destruction of the goods after they have been taken out of the debtor's possession by virtue of the process. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt is gone, although the creditor may not have been paid. He must take his remedy against the officer if he has been in fault; and if there be no such remedy, the creditor must bear the loss. Therefore it was held that if an officer, who has levied on a horse, by negligence lame the animal so that he is worth less than before by the amount due on the execution, it is a satisfaction of the judgment, and he can not afterwards proceed on the execution or procure it to be renewed." *Id.*

But notwithstanding this apparent conflict of authority as to the effect of the levy, a cursory examination shows that it is merely apparent and not real—a difference as to nomenclature rather than a material conflict as to the real result of the levy. The decisions generally concur in maintaining the exceptions to the rule, and whether they hold the levy to be a satisfaction *per se*, or only *prima facie* and *sub modo*, they agree that under certain circumstances, such as those previously mentioned and treated at length below, the levy will not constitute a satisfaction. "Levy upon personal property sufficient in value to satisfy the execution is frequently said to operate *per se* as an extinguishment of the judgment, and consequently as a satisfaction of the execution. In regard to the effect of such a levy, there is no substantial conflict of opinion, though the judges have differed somewhat from one another in describing this effect and the means by which it is produced. None of the decisions assume that a levy produces any absolute satisfaction. It is a satisfaction *sub modo*; the levy must be fairly exhausted before further proceedings can be taken, and while these proceedings are going on, the plaintiff can not have another execution, nor sue on the judgment, nor redeem lands under it." *Freeman on Executions*, sec. 269; *Freeman on Judgments*, sec. 474. The distinctions so forcefully taken in *People v. Hopson*, from which quotation is

made above, are to be accepted *cum grano salis*. For they "show a difference in the choice of terms in which to convey the same idea rather than any material difference of opinion. By whatever term we designate the result of a levy on personal property, and from whatever cause that result is thought to proceed, the result remains the same. The levy upon and taking possession of goods sufficient to pay the judgment is *prima facie* a satisfaction of the execution, and casts upon the party who made such a levy, before he can proceed further, the *onus* of establishing that from no fault of his or of the officers, or from some act or consent of the defendant, the levy has not proved productive of a complete satisfaction:" Freeman on Executions, sec. 269; Freeman on Judgments, sec. 474; see also *Johnson v. Tuttle*, 9 N. J. Eq. 365; *Banta v. McClennan*, 14 Id. 120; *Newsom v. McLendon*, 6 Ga. 392; *Horn v. Ross*, 20 Id. 210. "It is apparent that the satisfaction, if such it may be called, produced by a levy on personal property, is liable to be removed by a variety of circumstances. Therefore it is probable that the term 'suspension' is more applicable to the effect of such a levy than the term 'satisfaction:'" Freeman on Executions, sec. 269; Freeman on Judgments, sec. 474.

The rule as to the effect of a levy upon personal property under an execution does not apply in case of an attachment: *McBride v. Farmers' Bank*, 7 Abb. Pr. 347; S. C., 28 Barb. 476; *Cravens v. Wilson*, 48 Tex. 324; *Maxwell v. Stewart*, 22 Wall. 77.

NO SATISFACTION ENSUES IF THROUGH NO FAULT OF PLAINTIFF the levy fails to produce actual satisfaction; and he may proceed to obtain a further execution of the judgment: *Green v. Burke*, 23 Wend. 490; *Newsom v. McLendon*, 6 Ga. 392. The presumption of satisfaction arising from the levy upon personalty may be rebutted by proof that actual satisfaction was not received through the insufficiency of the proceeds of the levy: *Modg v. Harper*, 28 Miss. 615; *Bibb v. Jones*, 7 How. (Miss.) 397; *McNutt v. Wilcox*, 1 Freem. Ch. 116; *Newsom v. McLendon*, 6 Ga. 392; *Caudle v. Dare*, 7 Ark. 46. The sheriff's return that the chattels are of sufficient value to satisfy the judgment and execution does not estop the plaintiff, but he may show that the amount of the property actually seized and applied to his execution was less than that returned in the levy: *Cravens v. Wilson*, 35 Tex. 52. In *Campbell v. Pope*, Hempst. 271, it is held that the creditor must look to the sheriff for the deficit, and that he may show by parol the real value of the goods levied on, so as to arrive at the amount of damages he has sustained. But in *Ambrose v. Weed*, 11 Ill. 488, it is held that a levy on personal property apparently of sufficient value to satisfy the judgment is not an absolute satisfaction, but *sub modo* only; for until the levy is disposed of, it can not be certainly known that it will produce an absolute satisfaction; and therefore the officer in levying on property to satisfy an execution should determine its value, not by the price demanded for it when sold privately, but should take into account the probable extent of sacrifice to which it would be subjected at a public sale: *French v. Snyder*, 30 Id. 343. In *Denvrey v. Fox*, 22 Barb. 522, it is held that the sheriff may levy on other personal property after a levy on property sufficient in value to satisfy the execution. "It would be extremely dangerous to hold that when the officer had once levied on sufficient property to satisfy the execution his power to levy upon more was gone. How is he to know when he has made a sufficient levy? This can not usually be ascertained with certainty until the sale." A levy in which value of property is not shown is not a presumptive satisfaction of the execution: *Fuller v. Watkins*, 11 Heisk. 489. Therefore, if when sold the proceeds prove insufficient

to satisfy the amount of the judgment, the presumption of satisfaction is rebutted to the extent of the deficit: *Trenary v. Cheever*, 48 Ill. 28; *Peale v. Bolton*, 24 Miss. 630; *Brown v. Kidd*, 34 Id. 291.

So where satisfaction could not have resulted from the levy on account of senior executions or other prior liens the levy will be no satisfaction: *Peay v. Fleming*, 2 Hill Ch. 97; *Newsom v. McLendon*, 6 Ga. 392; *Cornelius v. Burford*, 28 Tex. 202; *Hanness v. Bonnell*, 23 N. J. L. 159; *People v. Hopson*, 1 Denio, 574. But the presumption of satisfaction from levy on personalty is not rebutted by merely showing that it was sold at an irregular sale and the proceeds applied to debts of higher lien, but it is necessary to show that though sold irregularly, the property brought its full value, or that the property rated at its full value would not have been sufficient to satisfy the prior debts and also the *fi. fa.*: *Horn v. Ross*, 20 Ga. 210. The doctrine that where there is a misapplication of money made on executions by the sheriff the judgment which is entitled to the money is satisfied thereby, must be limited to the case where all the executions have been levied on the property sold, and the sale has taken place under all. It has no application to executions not actually levied: *Banks v. Evans*, 10 Smed. & M. 35; S. C., 48 Am. Dec. 734. If the debtor consent to the application of the proceeds to junior executions the levy will be as to him no satisfaction, though it will let in other junior liens: *Barber v. Reynolds*, 44 Cal. 520. See also other cases below, holding that the levy produces no satisfaction when applied to the debtor's benefit.

So where there is some inherent defect in the levy so that no title has passed, or where the appraisement is defective, or there has been no return of the levy, no satisfaction follows, and the creditor may sue on his judgment: *Tate v. Anderson*, 9 Mass. 92; *Williams v. Amory*, 14 Id. 19; *Lawrence v. Pond*, 17 Id. 433.

The case of slaves levied on and afterwards becoming emancipated furnished another example of the levy proving inefficient through no fault of the creditor: *McElwee v. Jeffries*, 7 S. C. 228; *Wade v. Watt*, 41 Miss. 248.

Levy should be upon sufficient property. And where the return was of a levy "to make the sheriff's fees," it did not create the presumption of satisfaction: *Bibb v. Jones*, 7 How. (Miss.) 397. An execution may be renewed even though sufficient property to satisfy it has been levied on and is held under levy, when there is not time enough remaining to advertise and sell: *People v. Hopson*, 1 Denio, 574.

In *Green v. Burke*, 23 Wend. 489, it was held that where a levy was made by a constable who at the time was a minor, and who subsequently abandoned the levy to relieve himself from the consequences of his unlawful act in taking upon himself the duties of the office while within age, the levy made by him was not a satisfaction of the judgment, and the plaintiff might have a new execution and levy upon other property.

The doctrine that a levy upon personal property is *prima facie* a satisfaction of an execution, does not apply to a case where a debtor is arrested upon execution and the sheriff is compelled to accept such property as he tenders, not as a sufficiency to satisfy the debt, but with a view to his discharge upon an oath of insolvency: *Freeman v. Smith*, 7 Ind. 582.

If, however, property sufficient in value to satisfy the judgment has been levied on and the property detained from the defendant's possession, a second levy can not be made during the subsistence of the first undisposed of: *Hoyt v. Hulson*, 12 Johns. 207; *Bingamon v. Hyatt*, Smed. & M. Ch. 437; *Ferriday v. Selcer*, 1 Freem. Ch. 258; *Morrow v. Hart*, 1 A. K. Marsh. 291; *Allen v. Johnson*, 4 J. J. Marsh. 235, 236.

IF CHATTELS AGAIN COME INTO POSSESSION OF DEBTOR, LEVY IS NO SATISFACTION. As we have seen, the reason that a levy on personal property is ever deemed a satisfaction of the judgment and execution is because the debtor is deprived of the possession of his property. This reason of course fails if the property returns into his possession. And in that case the levy produces no satisfaction provided the debtor reobtains the possession by his own consent, express or implied. Where the chattels levied on are abandoned and left in the debtor's possession or restored to him at his request or for his benefit, no satisfaction ensues, and an *alias* execution may issue: *Cornelius v. Burford*, 28 Tex. 202; *Stone v. Tucker*, 2 Bailey, 495; *Porter v. Boone*, 1 Watts & S. 251; *Cummins' Appeal*, 9 Id. 73; *Wright v. Young*, 6 Or. 87; *Binford v. Alston*, 4 Dev. L. 351; *Ostrander v. Walters*, 2 Hill (N. Y.), 329; *People v. Hopson*, 1 Denio, 574; *People v. Onondaga C. P.*, 19 Wend. 79; *Holbrook v. Champlin*, 1 Hoffm. Ch. 148; *Peck v. Tiffany*, 2 N. Y. 451; *Williams v. Boyce*, 11 Mo. 537; *Blackburn v. Jackson*, 26 Id. 308; *Thomas v. Cleveland*, 33 Id. 126; *Churchill v. Warren*, 2 N. H. 298; S. C., 9 Am. Dec. 73; *Morton v. Walker*, 7 How. (Miss.) 554; *Ferriday v. Selcer*, 1 Freem. Ch. 258; *Sasscer v. Walker*, 5 Gill & J. 102; *Morrow v. Hart*, 1 A. K. Marsh. 291; *Allen v. Johnson*, 4 J. J. Marsh. 235, 236; *First Nat. Bank v. Rogers*, 15 Minn. 381; *Wade v. Watt*, 41 Miss. 248; *Voorhees v. Gros*, 3 How. Pr. 262; *In re King*, 2 Dev. L. 341; *United States v. Dashiell*, 3 Wall. 688; *Williams v. Bowdon*, 1 Swan, 282; *Charlton v. Lay*, 5 Humph. 496, 497. Assent of defendant to release of former levy so as to permit a subsequent levy may be implied from his sale and use of the goods after the release: *Carns v. Pickett*, 2 Sneed, 655. When the property levied on has already been transferred to and is held by an assignee of the judgment debtor for the benefit of creditors, and such levy is subsequently released and the property returned to such assignee at the request and for the benefit of such debtor, no satisfaction ensues: *Willis v. Jelineck*, 27 Minn. 18. So the levy may be abandoned in order that the debtor may the better find purchasers for his property: *United States v. Dashiell*, 3 Wall. 688.

The same result follows if the debtor regains possession of the goods levied on by fraud, or where they are removed from the sheriff's possession through his connivance or permission: *Webb v. Bumpass*, 9 Port. 201; S. C., 33 Am. Dec. 310; *Ontario Bank v. Hallett*, 8 Cow. 192; *Mickles v. Haskin*, 11 Wend. 125; *Wood v. Torrey*, 6 Id. 562, 564; *People v. Hopson*, 1 Denio, 574; *Trenary v. Cheever*, 48 Ill. 28; *Cornelius v. Burford*, 28 Tex. 202; *In re King*, 2 Dev. L. 341; *Hanness v. Bonnell*, 23 N. J. L. 159.

A defendant in whose custody personal property levied on is left, having lost it or converted it to his own use, such loss or conversion is a sufficient disposition of the levy to authorize the issuance of another execution: *Cooley v. Harper*, 4 Ind. 454.

But the plaintiff, after he has made sufficient levy, can not change it, except with the consent of the defendant; nor can the officer making the levy change it of his own accord: *Smith v. Hughes*, 24 Ill. 270. And if any loss resulted to creditor in consequence of the act of the sheriff in taking certain property as a satisfaction of the execution, his remedy would be against the officer and his sureties. The property received in this case was a county warrant: *Trigg v. Harris*, 49 Mo. 176.

LEVY PRODUCES NO SATISFACTION WHEN REMOVED FROM PLAINTIFF'S POSSESSION BY LEGAL PROCESS. Such is the case where it is placed in the possession of a receiver in chancery, whether such action was taken at the defendant's instance or not: *Alexander v. Polk*, 39 Miss. 737. So where sale is prevented by interpleader: *Bean v. Seyfert*, 12 Phila. 224. And in general

such is the case if the goods be legally removed without act of plaintiff: *Banks v. Evans*, 10 Smed. & M. 35; S. C., 48 Am. Dec. 734. Such levy, it seems, is never deemed a payment unless the defendant would otherwise be deprived of his property twice under the same judgment: *Id.* See also *In re King*, 2 Dev. L. 341.

As to the effect of delivering up the property upon a forthcoming or delivery bond, there is considerable conflict. Some cases hold that in such case the levy is no satisfaction of the judgment; and if the condition is broken, it is maintained that the plaintiff may sue out a new execution upon the judgment, or he may have his execution against the sureties on the bond and the defendant together: *Hopkins v. Land*, 4 Ala. 427, 431; *Crawford v. Bank of Mobile*, 5 Id. 55; *Walker v. Bradley*, 2 Ark. 578, 593; *Curtis v. Root*, 28 Ill. 367; *Smith v. Lozano*, 1 Bradf. 171; *Walker v. McDowell*, 4 Smed. & M. 118; S. C., 43 Am. Dec. 476; *Parker v. Jones*, 5 Jones Eq. 276; *Cole v. Robertson*, 6 Tex. 356. There are many other authorities, however, holding that, as by the execution and forfeiture of such a bond a new judgment springs into existence, the original judgment is thereby extinguished: *Wright v. Yell*, *ante*, p. 336; *Douglas v. Twombly*, 25 Ark. 124; *Lipscomb v. Grace*, 26 Id. 231; *Joice v. Farquhen*, 1 A. K. Marsh. 20; *Harrison v. Wilson*, 2 Id. 547; *Witherspoon v. Spring*, 3 How. (Miss.) 60; S. C., 32 Am. Dec. 310; *Stewart v. Fuqua*, 1 Miss. 175; *Connell v. Lewis*, Id. 251; *Sampson v. Breed*, Id. 267; *Bank of the United States v. Patton*, 5 How. (Miss.) 200; *Davis v. Hoopes*, 33 Miss. 173; *Hoyt v. Hudson*, 12 Johns. 207; *Taylor v. Hulme*, 4 Watts & S. 407; *Pigg v. Sparrow*, 3 Hayw. 144; *Young v. Reel*, 3 Yerg. 296; *Camp v. Laird*, 6 Id. 246; *Carroll v. Fields*, 6 Id. 305. Were the bond irregular and faulty, however, and therefore not an actual satisfaction, it would not be constructively so: *Bingamon v. Hyatt*, Smed. & M. Ch. 437; *Rhea v. Preston*, 75 Va. 757. But this is more or less a matter of statutory construction, and only incidentally connected with the subject-matter of this note.

MISCELLANEOUS CASES WHERE LEVY ON PERSONALTY IS NOT SATISFACTION. A writ of error taken to the United States supreme court by a plaintiff below, who previously to taking the writ issues execution below and gets a partial but not a complete satisfaction on his judgment, will not, in consequence of such execution merely, be dismissed: *United States v. Dashiell*, 3 Wall. 688, Justices Grier, Nelson, and Swayne, dissenting. If, on the return of a mandate from the supreme court of the United States to the circuit court, affirming the judgment of the circuit court, a new judgment is rendered by the circuit court, the issuance of an execution on the new judgment and the levy on property sufficient to satisfy it is not a satisfaction of the new judgment or costs, for the new judgment is void, as the circuit court had no jurisdiction to render it, because the first judgment, being affirmed, was conclusive and in the highest sense final. Nor is such a levy a satisfaction of the original judgment, although after it was made the circuit court set aside the new judgment and ordered the old one to be enforced: *Mulford v. Estudillo*, 32 Cal. 131, 139. A levy in virtue of an execution upon a judgment obtained as a collateral security for another judgment is not a satisfaction of the latter: *Ontario Bank v. Hallett*, 8 Cow. 192. One who has collected money on an execution can not defend, when sued for the money, that the execution had been satisfied by a levy on personal property: *Charlton v. Lay*, 5 Humph. 496. After a satisfaction by levy the judgment ceases to be a lien on real estate, and the judgment creditor has no right as such to redeem under the statute: *Ex parte Lawrence*, 4 Cow. 417.

LEVY ON PERSONALTY AS PLEA IN BAR TO ACTION ON JUDGMENT.—A

levy upon personal property is a good plea in bar to a *scire facias* or action of debt on the judgment: *Banta v. McClennan*, 14 N. J. Eq. 120; *Mountney v. Andrews*, Cro. Eliz. 237. But it must show that the writ was returned, and that the levy was upon property sufficient in value to satisfy the judgment: *Peploe v. Galliers*, 4 Moore, 163; and that the goods are still retained by the sheriff: *Waddell v. Elmendorf*, 5 Denio, 447; *Taylor v. Ranney*, 4 Hill, 621. A plea of goods taken on execution upon the judgment on appeal is a good defense to an action on the appeal bond: *Case v. Adams*, 3 Ohio, 223. Where, however, the levy was defective so that no title passed by it, the creditor may have his action on the judgment: *Whittemore v. Carlin*, 58 N. H. 576; *Tate v. Anderson*, 9 Mass. 92; *Williams v. Amory*, 14 Id. 19; *Lawrence v. Pond*, 17 Id. 433. Levy, whether upon goods or lands, in Indiana, is a bar to subsequent suit for same demand until its insufficiency is proved by sale and return: *McIntosh v. Chew*, 1 Blackf. 289.

LEVY ON PERSONAL PROPERTY OF CO-DEFENDANT NO SATISFACTION IN FAVOR OF OTHER DEFENDANT. Where there are two defendants, a levy on the personal property of one is a satisfaction, if it be any satisfaction, as to him alone. But the sale of the property of one defendant if it produce a sufficient amount to satisfy the judgment will discharge both defendants: *Walker v. Bradley*, 2 Ark. 578, 593; *McNutt v. Wilcox*, 1 Freem. Ch. 116; *McGinnis v. Lillard's Ex'r*, 4 Bibb, 490; but see *Kershaw v. Merchants' Bank of N. Y.*, 7 How. (Miss.) 386; S. C., 40 Am. Dec. 70. The release from levy of the property of one joint debtor is no bar to an action against the other: *Churchill v. Warren*, 2 N. H. 298; S. C., 9 Am. Dec. 73; *Binford v. Alston*, 4 Dev. L. 351. A co obligor can not plead anything but satisfaction: *Dyke v. Mercer*, 2 Show. 394.

RELEASE OF LEVY ON PERSONAL PROPERTY IS SATISFACTION AS TO SURETIES, bona fide purchasers, subsequent creditors and incumbrances, indorsers, and third persons generally. When the creditor, after obtaining the means of satisfying his judgment by seizing chattels of the debtor of sufficient value, foregoes his advantage, and yields up the property to the debtor, although as between himself and the debtor no satisfaction will be produced, yet the rights of innocent third parties having intervened, such an act of negligence on the part of the creditor will not be permitted to prejudice them, but their rights will supervene, subsequent incumbrances will be let in, and third persons whose liability, dependent upon that of the debtor, would have been discharged with an actual satisfaction of the judgment, will be, by this voluntary act of the creditor, released from their liability. It is a familiar and fundamental principle of the law that the rights of innocent third parties are not to be jeopardized with impunity by the caprice of another. Equally familiar is the doctrine in the law of suretyship, that the release of securities for the payment of the principal's debt will in general discharge the surety, if done without his consent. So where a levy has been made upon personality of the debtor sufficient in value to satisfy the judgment and execution, if the creditor release the property from the levy without the surety's consent, the surety will be discharged: *Finley v. King*, 1 Head, 123; *Talmadge v. Burlingame*, 9 Pa. St. 21-23; *Howerton v. Sprague*, 64 N. C. 451; *Curran v. Colbert*, 3 Ga. 239; *Brown v. Riggins*, Id. 405; *Morley v. Dickinson*, 12 Cal. 561; but see *Stone v. Tucker*, 2 Bailey, 495. Surrendering the levy, and accepting a bond and mortgage from the principal debtor, in full discharge of the judgment, discharges the surety, it seems, though the mortgage be void for usury: *La Farge v. Herter*, 4 Barb. 346; S. C., 9 N. Y. 241. A stay of execution by the creditor, after levy, without the consent of the sureties,

releases them: *Jones v. Bullock*, 3 Bibb, 467. And hereupon we find some courts ready to assert that the mere levy upon sufficient personal property, though not a satisfaction as to the debtor, will be, *per se*, a satisfaction as to third persons liable as sureties: *Finley v. King*, 1 Head, 123; *Mulford v. Estudillo*, 23 Cal. 94. But this can not be maintained. For, although the levy has been duly made, if it produces no satisfaction, through no fault of the plaintiff, the surety will not be discharged. The payment of the execution must be defeated by some misconduct of the plaintiff before the surety can complain. Thus, if the levy is released without the plaintiff's consent, the surety will still remain liable: *Summerhill v. Trapp*, 48 Ala. 363. So where the levy is annulled by mandate of law, as by *supersedeas*: *Fry v. Manlove*, 1 Baxt. 256; *Bennett v. McGrade*, 15 Minn. 132; *First Nat. Bank v. Rogers*, Id. 381. In an action on an appeal bond neither the defendant nor his surety can set up as a satisfaction of the judgment a levy on personal property which was withdrawn from the officer's custody by the execution of a delivery bond, the condition of which had not been complied with: *Ambrose v. Weed*, 11 Ill. 488. And in *Railde v. Whitney*, 4 E. D. Smith, 378, it is held that the mere levy on property sufficient to satisfy the execution will not amount to a satisfaction sufficient to discharge a surety, though the sheriff remain in possession a day and a half, and only abandons the levy upon the plaintiff's refusing to indemnify him. The better rule is that a dismissal of a levy on sufficient personal property, without the surety's consent, *prima facie* discharges the surety, and the burden is on the plaintiff to show that it did not injure the surety, either by proving that the property levied on was not the property of the principal defendant, or other facts going to show that the surety was not injured by the dismissal, either by increasing his risk or by exposing him to greater liability: *Rawson v. Gregory*, 59 Ga. 733. But while the levy subsists it is a good defense by the sureties to any further proceedings against them: *First Nat. Bank v. Rogers*, 13 Minn. 407.

As to *bona fide* purchasers, though between the plaintiff and defendant a levy on personal property may be made and abandoned without extinguishing the judgment, yet it is an extinguishment of the judgment as to a subsequent *bona fide* purchaser for valuable consideration of lands bound by the judgment: *Voorhees v. Gros*, 3 How. Pr. 262; *Wood v. Torrey*, 6 Wend. 562, 563; *Ford v. Commissioners*, 7 Ohio, 492, overruling *Ford v. Skinner*, 4 Id. 379. The lien of a *fi. fa.* is lost by abandonment as to intervening assignees of property, and suing out an *alias* execution before the levy under the original execution is disposed of is an abandonment of the original levy when there is nothing to connect the property levied on under the *alias* with the property seized under the *fi. fa.* except similarity of description: *Missimer v. Ebersole*, 87 Pa. St. 109. So when the defendant with whom property levied on has been left removed it from the county, a new execution may issue and be levied upon real estate, saving, however, the rights of subsequent purchasers attaching after the removal of the personal property: *People v. Onondaga C. P.*, 19 Wend. 79.

A release or abandonment of the levy is likewise a satisfaction as to the other creditors of the debtor, and they may resort to the property if they see fit as if no execution had issued: *Rhea v. Preston*, 75 Va. 757; *Lyon v. Hampton*, 20 Pa. St. 46; *Mayson v. Irby*, 1 Rich. L. 435; *Moore v. Kelly*, 2 McMull. 350; *Hunt v. Breeding*, 12 Serg. & R. 37; S. C., 14 Am. Dec. 665. In *Williams v. Brown*, 57 Ga. 304, the release of the property was for a valuable consideration, and this was held to be a satisfaction to the extent of the value of the property released, as far as purchasers and creditors are concerned.

The application of levy to payment of other debts, waste, or depreciation of value resulting while the property is under the plaintiff's or sheriff's control or in the debtor's possession should not be deducted from amount to be credited on the *feri facias* respecting other creditors or claimants, but they are entitled to have the *feri facias* credited with the value of the property at the time of levy: *Chisholm v. Chittenden*, 45 Ga. 213; *Campbell v. Spence*, 4 Ala. 543; S. C., 39 Am. Dec. 301. And in general the lien may be lost by laches: *Michie v. Planters' Bank*, 34 Am. Dec. 112, and note citing the prior cases in the series. If the property levied on remain, by the plaintiff's consent, in the defendant's possession and under his control, an indefinite stay of the execution under the plaintiff's orders is such a suspension of the plaintiff's lien that a subsequent execution shall have the preference, if proceeded upon before the sheriff is ordered to execute the first writ: *Cook v. Wood*, 16 N. J. L. 254. But in this, as in other cases, if the plaintiff is deprived of the fruit of his levy without his own fault, it will not prove such a satisfaction: *Lyon v. Hampton*, 20 Pa. St. 46.

So a levy on sufficient personal property is a satisfaction as to junior incumbrances upon real estate, although, in consequence of the sheriff's indulgence to the debtor and the plaintiff's neglect to enforce it, it produces nothing: *Hayden v. Auburn Prison*, 1 Sandf. Ch. 195; see *Benjamin v. Smith*, 4 Wend. 332; *Kimball v. Munger*, 2 Hill (N. Y.), 364; *Herkimer County Bank v. Brown*, 6 Id. 232. Such levy releases a mortgage given to secure payment of judgment, and at most can not be revived by voluntary release of property levied on: *People v. Chisholm*, 8 Cal. 29. And allowing the proceeds of such a levy to be applied to the satisfaction of junior judgments, though with the debtor's consent, lets in a junior mechanic's lien: *Barber v. Reynolds*, 44 Id. 520.

So a levy on goods of drawer and release by creditor is a discharge of indorsers *pro tanto*: *Bank v. Fordyce*, 9 Pa. St. 275. A levy on sufficient goods of the maker of a note is a good plea in bar by an accommodation maker when sued by the indorsee: *Farmers' etc. Bank v. Kingsley*, 2 Dougl. 379. But in *Hodgson v. Turner*, 1 Cranch C. Ct. 174, it is held that a levy on the drawer's goods is no bar to a judgment against an indorser, and does not discharge him from his liability. If, however, through no fault of the plaintiff the goods levied on fail to produce satisfaction, the indorser will not be discharged. Thus, where the sale of the maker's goods is prevented by mandate of law, by interpleader, the levy is no defense for the indorser: *Rice v. Groff*, 58 Pa. St. 116. So it may be proved, to hold the indorser, that the property was not subject to execution: *Bank of Tenn. v. Turney*, 7 Humph. 271.

So in general, as far as third persons are concerned, a levy upon sufficient personal property to satisfy the judgment and a release of the property from levy is an extinguishment of the judgment: *Newsom v. McLendon*, 6 Ga. 392; *Fruitt v. Ludwig*, 25 Pa. St. 145; *Woodward v. Wulton*, 7 Heisk. 50. And indeed the levy itself may be considered a satisfaction, with regard to this class of persons, if the rule is qualified by the proviso that it will not have that effect if the creditor be deprived of the levy through no fault, neglect, or indulgence of his own or on the part of the officer: *Lynch v. Pressley*, 8 Ga. 327; *Williams v. Gartrell*, 4 G. Greene, 287; *Duncan v. Harris*, 17 Serg. & R. 436; *Freeman on Executions*, sec. 269.

CHATELS LEVIED ON BEING LOST OR WASTED, LEVY IS SATISFACTION. There is another case in which the levy may constitute a satisfaction. In general, the sheriff is liable for the safe keeping of the goods, and if through his negligence they become incapable of satisfying the judgment, the

plaintiff must look to him and his sureties: *Hanness v. Bonnell*, 23 N. J. L. 159; *Cornelius v. Burford*, 28 Tex. 202. So where the personal property levied on is sufficient in value to satisfy the execution, but by the act of the plaintiff or the officer the goods are lost to the defendant or wasted, the levy will be a satisfaction, and if the loss be through the fault of the officer, the plaintiff must look to him: *Porter v. Boone*, 1 Watts & S. 251; *Peck v. Tiffany*, 2 N. Y. 451; *Campbell v. Spence*, 4 Ala. 543; S. C., 39 Am. Dec. 301. So where the officer has misappropriated or misapplied the proceeds arising from the sale, or does not return the execution, the same result ensues, and the creditor's remedy is in the same direction: *Ladd v. Blunt*, 4 Mass. 402; *Fuller v. Loring*, 42 Me. 481.

But if the loss of the property levied on be the result of accident in no way chargeable to the officer or the plaintiff, neither will be responsible, but the defendant, not having paid the debt, and therefore being the delinquent party, must bear the loss: *Starr v. Moore*, 3 McLean, 354. Loss occasioned by a postponement of the sale at the defendant's request, and the consequent depreciation in the value of the property, should not be sustained by the plaintiff: *Williams v. Gartrell*, 4 G. Greene, 287. Mere seizure does not divest title of judgment debtor; and if after the seizure the officer sell and return the proceeds of the property on a different and subsequent execution, it is no bar or satisfaction of the first execution. For such a wrong both the debtor and creditor have a remedy against the officer, but that remedy, when resorted to by the creditor, is only collateral to his original claim against the debtor: *Folsom v. Chesley*, 2 N. H. 432.

SPECIAL PROPERTY IN SHERIFF UNDER LEVY ON PERSONALTY.—The basis of the rule that a levy on personal property can ever constitute a satisfaction is that the defendant is deprived of the possession of his property, whereas this is not so in case of a levy upon realty. However, though deprived of the possession, he is not deprived of the general ownership of the property until a sale under the execution. But the sheriff has a special property in the goods, and may sell without a *venditioni exponas*, which is not the case when real property is the subject of the seizure: *Williams v. Herndon*, 54 Am. Dec. 554, citing the prior cases in this series in the note: *Barden v. McKinnie*, 4 Hawks, 299; S. C., 15 Am. Dec. 519; *Fuller v. Loring*, 42 Me. 481; *Wade v. Watt*, 41 Miss. 248; *Lester's Case*, 4 Humph. 383; *Overton v. Perkins*, 10 Yerg. 328, 330.

LEVY ON LAND PRODUCES NO SATISFACTION.—"The nature of proceedings by levy and sale [of land] under execution is entirely different from that which formerly resulted in setting off to the creditor sufficient lands of the debtor to discharge the debt. By a levy of land under execution the creditor acquires no property in the land, absolute or conditional. Such a levy, unless consummated by a sale (and then only to the extent of the proceeds realized), is no satisfaction of the judgment. * * * The only effect of the levy of an execution upon real estate is to make the actual interest of the defendant therein liable to be taken and sold to satisfy the writ, and to make the title deraigned through such a sale paramount to all conveyances and incumbrances made subsequent to the levy." Freeman on Executions, sec. 282. A levy upon land is not even *prima facie* a satisfaction, for it does not interfere with the possession or title of the debtor: *Peale v. Bolton*, 24 Miss. 630; *White v. Graves*, 15 Tex. 183; *Boyd v. Mann*, 9 Baxt. 349; *Reynolds v. Rogers*, 5 Ohio, 169; *Hoard v. Wilcox*, 47 Pa. St. 51, 60; *Gro v. Huntingdon Bank*, 1 Pen. & W. 425; *Patterson v. Swan*, 9 Serg. & R. 16; *Shepard v. Rowe*, 14 Wend. 260; *Taylor*

v. *Ranney*, 4 Hill, 621; *Beasley v. Prentiss*, 13 Smed. & M. 97; *Smith v. Walker*, 10 Id. 584; *Spafford v. Beach*, 2 Dougl. 150; *Gold v. Johnson*, 59 Ill. 62; *Robinson v. Brown*, 82 Id. 279; *Gregory v. Stark*, 3 Scam. 612; *Delvach v. Myrick*, 6 Ga. 410; *Foster v. Rutherford*, 20 Id. 676; *Overby v. Hart*, 68 Id. 493; *Hammond v. Myrick*, 14 Id. 77; *Hogshead v. Caruth*, 5 Yerg. 227; *McElwee v. Jeffries*, 7 S. C. 228; *Fry v. Branch Bank at Mobile*, 16 Ala. 282. A levy on land gives the officer no possession, and consequently no title. The death of the owner of land levied on before a sale thereof passes the whole title to his heirs; and without a revivor against them, a sale by the levying officer passes no title: *Huston v. Duncan*, 1 Bush, 205; *Fry v. Branch Bank at Mobile*, 16 Ala. 282.

In Indiana a levy upon realty as well as upon personalty constitutes a *prima facie* satisfaction of the judgment. In this state a levy upon real estate of sufficient value to pay the judgment creates a presumption of satisfaction, and there exists no distinction between the effect of a levy upon real estate and that of a levy upon personal property. This presumption of satisfaction does not, however, arise from a mere levy, but from proof that the property levied upon is sufficient to satisfy the execution: *Sindley v. Kelly*, 42 Ind. 294; *McCabe v. Goodwine*, 65 Id. 288; *State v. Nunemaker*, 2 Id. 47. *Anthony v. Humphries*, 9 Ark. 176, a case also to this effect, is overruled in the principal case. But even in Indiana the levy is only *prima facie* a satisfaction, and it will be no satisfaction if proved to be upon land not belonging to the defendant: *Mace v. Dutton*, 2 Ind. 309; S. C., 52 Am. Dec. 510.

Although a levy upon land is no satisfaction, no other *fi. fa.* can issue until the land levied on under the first has been sold, or released, or otherwise disposed of. The debtor is not to be gratuitously hindered or harassed: *Hopkins v. Chambers*, 7 B. Mon. 257, 262; and see the principal case. Where the execution has been levied on real estate not belonging to the debtor, the creditor must first move the court to vacate the levy before he can proceed to obtain actual payment of the debt: *Tudor v. Taylor*, 26 Vt. 444. The judgment creditor may not unnecessarily and without cause relinquish the levy to the prejudice of purchaser or sureties; but embarrassments upon the title, difficulties in making a fair sale, or the probability of not making the money from it in consequence of earlier incumbrances, are sufficient causes: *Commercial Bank v. W. R. Bank*, 11 Ohio, 444. But the fact that a second execution is issued before the first is disposed of will not prejudice a purchaser's title. The existence of a levy upon the debtor's land does not affect the validity of a purchaser's title to lands of the debtor sold under a second execution subsequently issued on the same judgment, or upon the revival of the judgment by *scire facias*: *Gold v. Johnson*, 59 Ill. 62; *Robinson v. Brown*, 82 Id. 279. An *alias fi. fa.*, issued on the return of a previous execution levied upon real estate which remained unsold for want of bidders, is irregular merely, but not void: *Spafford v. Beach*, 2 Dougl. 150. But in such case an *alias fi. fa.* may issue against personal property: *Hogshead v. Caruth*, 5 Yerg. 227. And if executions levied on real estate are enjoined on the ground that other property is first liable, subsequent executions may issue: *Beasley v. Prentiss*, 13 Smed. & M. 97. A dismissal of the levy by order of the plaintiff's attorney is a sufficient disposition of it: *Hammond v. Myrick*, 14 Ga. 77. In *Overby v. Hart*, 68 Ga. 493, it is held that the fact that a *fi. fa.* has been levied on land, a claim interposed and dismissed, and the *fi. fa.* ordered to proceed, will not prevent a levy on other realty, or require the *fi. fa.* to proceed on the original levy first. But see the principal case.

It further follows from the levy on land being no satisfaction, that it will be no plea in bar to a *scire facias*, or action of debt on the judgment, as is the case with a levy on personalty: *Hoard v. Wilcox*, 47 Pa. St. 51, 60; *Boyd v. Mann*, 9 Baxt. 349; and see the principal case. But the court may in its discretion, on application, stay proceedings in an action brought to recover the same debt till the sale of the real estate and the return of the execution: *Gregory v. Stark*, 3 Scam. 612. And where an execution is issued, and the defendant has real estate upon which a levy may be made, and the plaintiff subsequently commences an action on the judgment, it seems the court, upon application, would stay the suit until a sale and return of the execution: *Shepard v. Rowc*, 14 Wend. 260. During the subsistence of the levy the plaintiff may proceed by *scire facias* against the bail the defendant has entered to procure a stay of execution, though he can obtain but one satisfaction of his judgment: *Patterson v. Swan*, 9 Serg. & R. 16. In Maine, by statute, it is provided that when an execution has been levied upon real estate, and before it has been returned and recorded it is ascertained that the levy is invalid for any reason, the creditor may waive the levy and resort to any other remedy for the satisfaction; but after the execution is returned and recorded, if the levy proves to be invalid, the creditor may have a *scire facias* to revive the judgment. And it was held that in the latter case *scire facias* would be his only remedy, and debt would not lie: *Grosvenor v. Chesley*, 48 Me. 369.

Another conclusion from the fact that the levy on realty is no satisfaction, is that after such a levy the plaintiff may have execution of the chattels of the indorsers of the paper upon which judgment has been obtained against the debtor; a judgment having been obtained also against the indorsers: *Gro v. Huntingdon Bank*, 1 Pen. & W. 425. So a stay of the sale for a year by the defendant, under a valuation law, would not remove or destroy the lien of the judgment: *Pickens v. Marlow*, 2 Smed. & M. 428.

EXTENTS AS SATISFACTION OF JUDGMENT AND EXECUTION.—“In most of the New England states lands are extended under execution, and set off to the creditor instead of being sold. It is not until the officer has delivered seisin to the creditor, and it has been accepted by him, that the extent becomes final and the title to the real estate divested. Hence, under this system, as well as where lands are taken and sold, the mere levy of the execution upon real estate can not operate as a satisfaction thereof.” Freeman on Executions, sec. 282. A return of “lands delivered” on an *elegit* is a legal satisfaction of the judgment, and though the judgment be afterwards revived on a *scire facias* against the defendant alone, this will not preclude the tenant from setting up such defense: *Hinesly v. Hunn*, 5 Harr. (Del.) 236. And if the execution be duly levied, and possession taken by the creditor, it will work a satisfaction of the judgment, although the same be not recorded in the registry of deeds within three months, as required by statute: *McLellan v. Whitney*, 15 Mass. 137. Where a judgment creditor makes a valid levy of his execution on land in which the debtor has an estate for his own life, and the debtor's interest in the land and its income are set off to such creditor at a yearly value “to continue” for a term of years, “should the debtor so long live,” in full satisfaction of the execution, the judgment debt is satisfied by such levy, although the debtor die before the expiration of such term of years: *Thomas v. Platts*, 43 N. H. 629. See also *Pratt v. Jones*, 22 Vt. 341; S. C., 54 Am. Dec. 80; Freeman on Executions, sec. 282; Freeman on Judgments, sec. 475. Satisfaction is not effected because the debtor's title is not divested until the return is made of the extent and seisin is delivered

to the creditor: *Ladd v. Blunt*, 4 Mass. 402; *Lawrence v. Pond*, 17 Id. 433. An inquisition finding the land levied upon to be sufficient to pay in seven years is not a satisfaction, the plaintiff not having been put into possession: *Lyons v. Ott*, 6 Whart. 163.

Where the levy is unavailing, as where it is made subject to prior debts, or where, although the land is set off to the plaintiff, it has already been conveyed by the defendant, and the debt was therefore not in fact satisfied, the levy will be no satisfaction, and debt or *scire facias* on the judgment will lie: *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536; *Cowles v. Bacon*, 21 Conn. 451; *Clarkson v. Beardsley*, 45 Id. 196. Where a judgment creditor, who has caused his execution to be extended on the land of his debtor, brings an action of debt on his judgment, as he may do under the New Hampshire statute, and recovers a new judgment on the ground that the debtor had no title to the property levied on, the proceedings under the levy are avoided, and he can not afterwards set up a title to the property under it. And a subsequent release of the amount recovered will not restore or continue the right to claim the property under the levy: *Barker v. Wendell*, 12 N. H. 119.

LIEN OF JUDGMENT IS NOT CONTINUED BY LEVY OF EXECUTION.—"The levy upon lands during the life of a judgment lien can not prolong such lien beyond the period by statute. The sale must take place during the life of the judgment lien, or the purchaser can acquire only the title which the defendant held at the date of the levy." Freeman on Judgments, sec. 394. See *Bank of Missouri v. Wells*, 51 Am. Dec. 163, and note citing prior cases. The principal case is cited to this effect in *Isaac v. Swift*, 10 Cal. 81.

THE PRINCIPAL CASE IS CITED in *Lindley v. Kelly*, 42 Ind. 310, to the point that a levy upon property of sufficient value to satisfy the execution raises a presumption of satisfaction; in *Rose v. Thompson*, 36 Ark. 257, to the point that judgments and decrees that are liens upon real estate may be revived by *scire facias* for the purpose of continuing or fixing those liens.

NEWTON v. THE STATE BANK.

[14 ARKANSAS, 9.]

PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT RETURN OF SHERIFF, which is to be considered and treated as part of the record; consequently, in ejectment brought by purchaser under execution the defendant in execution can not show that the sale was made upon another day than that therein mentioned.

PURCHASER AT SHERIFF'S SALE, WHO HAS NO AGENCY IN CAUSING IRREGULARITIES therein, but in good faith acquires a legal title valid and regular upon the face of his deed, should have his title protected. Between such purchaser and the parties to the record it would be wrong to suffer them, in a collateral proceeding, to introduce parol evidence to contradict the record evidence of the purchaser's title.

SALE MADE ON RETURN DAY of the writ of execution is valid.

MERE IRREGULARITY IN EXECUTION SALE does not avoid it.

IF SHERIFF ABUSES HIS AUTHORITY TO PREJUDICE OF DEFENDANT IN EXECUTION, he is responsible in damages; or if the purchaser and sheriff combine to commit a fraud upon the defendant, he may apply to a court

competent to afford relief; but in a common-law court the validity of a sheriff's deed can not be questioned by parol evidence touching irregularities not affecting the officer's power or authority.

ERROR to the circuit court of Pulaski county. The opinion states the necessary facts.

Pike and Fowler, for the plaintiff.

Watkins and Curran, for the defendant.

By Court, **WALKER, J.** This was an action of ejectment brought by Newton against the bank for the recovery of certain lots of land in the city of Little Rock.

Newton claimed title to the lots as a purchaser at sheriff's sale, and at the trial of the case produced a record showing a judgment against the bank, an execution duly returned, showing a regular levy on the lots, their advertisement and sale according to law, and also the sheriff's deed duly acknowledged and recorded.

The bank (the defendant in execution) then offered to prove by parol evidence that the sale to the plaintiff was made without notice on a day subsequent to that stated in the sheriff's return; to the introduction of which the plaintiff objected, upon the ground that such evidence was inadmissible to contradict the return of the sheriff, and the recitals in the deed in that particular. But the circuit court overruled the objection, and permitted such evidence to be given to the jury; to which the plaintiff excepted. And the admission of this evidence over the objection of the plaintiff presents the only important question to be determined.

The act of the legislature, which requires the sheriff to recite the names of the parties, the date of the writ and of the judgment, together with a description of the time, place, and manner of the sale, and which makes such recitals evidence of the facts so recited, was intended by the legislature to supersede the necessity for producing the record from which such recitals were made, as a matter of convenience, and to furnish evidence of the authority under which the officer acted, as well as the manner in which he had executed his authority in the deed itself. Not that the recitals should be conclusive evidence of the facts recited, for that would exclude all inquiry into the authority under which the sheriff acted; but that it should be legal, competent evidence, until falsified by evidence of a higher and more authentic character. The acts of an officer done in obedience to the law, when required to be certified and returned, form a part of

the records of the case on which they are had: *Lawson v. Main*, 4 Ark. 186; and being part of the records, the return as well as the execution and the judgment imports absolute verity, and is alike conclusive as the judgment upon the rights of the parties to the record. It is upon this principle that this court in the case of *May v. Jameson*, 11 Id. 374, held parol evidence inadmissible to contradict a sheriff's return upon a writ of summons. And this decision of ours is fully sustained by numerous authorities and adjudged cases, in several of which the question arose under circumstances strikingly similar to the case before us. Thus in the case of *Love & Williams v. Powell*, 5 Ala. 58, in a suit to try title, where the plaintiff claimed under a sheriff's deed, the court held parol evidence inadmissible to contradict the sheriff's return, and in conclusion the court said: "Our conviction is that the deed is conclusive, and can not be impeached on a collateral issue, except for fraud in the execution of the deed, when the process under which the land was sold is supported by an existing unsatisfied judgment."

In the case of *Jackson v. Roberts*, 7 Wend. 86, the sheriff's deed described the sale as having been made under execution in favor of Hill & Stubbins. The defendant sought to disprove the truth of this recital by parol evidence. The court said the question is, "Can that part of the sheriff's deed be contradicted by parol evidence which sets forth the writ under which the sale was made?" The court then refers to and approves its former decisions in the cases of *Jackson v. Vanderheyden*, 17 Johns. 167 [8 Am. Dec. 378], and *Jackson v. Croy*, 12 Id. 427, in which parol evidence was held inadmissible to contradict a sheriff's deed; and after commenting upon the effects of a different rule, the court concluded its opinion with the following remarks: "We see no formidable mischief likely to result from the operation of such a principle. A party who may be injured by the mistake of a sheriff can have relief by a summary application to the courts under whose authority the sheriff acts, or through the medium of a court of equity; and it is much better that he should be confined to this mode of redress than to render all titles derived under judicial sales doubtful and subject to be defeated by allowing the written instruments by which they are evidenced to be attacked collaterally by parol evidence."

Chief Justice Sharkey says, in *Minor v. Selectmen of Natches*, 4 Smed. & M. 619 [43 Am. Dec. 488]: "The purchaser is not put upon inquiry as to the regularity of the judgment. In the

official character of the sheriff, and his general power derived from that character, purchasers have a guaranty that they will be protected in their title." Savage, C. J., in the case of *Jackson v. Cadwell*, 1 Cow. 644, said: "It may therefore be considered as settled law, that a *bona fide* purchaser at a sheriff's sale acquires a valid title as against the defendant in the execution, unless it is not only voidable but absolutely void."

The case of *Trigg v. Lewis*, 3 Litt. 132, lays down the general rule, and shows that it is peculiarly applicable to sheriffs' returns. The court says: "It is a general rule that the acts of a ministerial officer, as far as the rights of the parties affected thereby are concerned, must be taken as true when brought into contest collaterally, and can only be impeached by a direct proceeding, such as makes the officer a party. This rule is peculiarly applicable to returns of sheriffs on process. Hence this court decided in the case of *Smith v. Hornback*, 3 A. K. Marsh. 392, that the return of a sheriff on the writ of *habere facias possessionem* is conclusive. It is therefore clear that it was not competent for the defendant to aver and prove anything against the return of the officer in this instance; such as the proof tendered by the replication, that the land was not in fact sold, and that the proceedings relative thereto were not real."

The decisions are directly in point, and may be considered as conclusively settling the question: 1. That the return of the sheriff must be considered and treated as part of the records in the case; and 2. That parol evidence is inadmissible to contradict it. The door for reinvestigation is closed upon the parties to the record. It is not to be questioned by them, and this because they are parties to the record, and have day in court; and it is not only their interest but their duty to look to the regularity of the proceedings, and when passed without objection, they may be said in effect to have received the approval of the parties. And so with regard to the execution of final process. It is executed for their benefit by the officer of the law, and during the whole time up to the sale and acknowledgment of the deed, they have day in court, and it is their duty to see that the sale is conducted fairly; at least, if they should fail to do so, they have but little cause for complaint. The purchaser, a stranger, who had no agency in producing the irregularity, and no power to control or direct the action of the officer in any respect, who has bought in good faith, and acquired a legal title, valid and regular upon the face of his deed, should be protected in that title against those parties to the record who

have stood by and without objection suffered him to pay the purchase money, the benefit of which they receive, and receive a deed sanctioned and approved by the court, without objection from them. Under such circumstances, as between the purchaser and the parties to the record, it would be wrong to suffer them, in a collateral proceeding, to introduce parol evidence to contradict the record evidence of the purchaser's title.

This question has been substantially settled by the decision of this court in the case of *The State Bank v. Noland*, 13 Ark. 299, decided at the last term of this court, where it is held that after the purchaser has acquired title by sheriff's deed approved and ordered to be recorded, at no subsequent time after the lapse of that term shall his title be questioned for fraud, accident, or mistake, or for any irregularity in the proceedings, which must as of necessity (in most instances) arise out of one or other of these causes, upon motion, or in a proceeding at common law. But where the proceedings were such as, in the first instance, to vest in him a legal title to the estate therein conveyed, or, in the language of the court, when delivering its opinion in that case, "when his legal title is perfect, and when the validity of the title itself is assailed for fraud, accident, or mistake, arising out of the irregularity of the proceedings or the acts of the parties, he has a right to be heard before a tribunal that can rightfully exercise jurisdiction in such matters, with power and process to bring all the parties in interest before it, to put them upon their consciences to answer; to cancel the deed, to restore possession, and to award equitable compensation."

How far or under what circumstances the return of the sheriff and the recitals in the deed may be questioned in a direct proceeding in chancery for that purpose, or where fraud is alleged in the execution of the deed, we are not now called upon to decide; because, in the case before us, no offer was made to introduce evidence to prove fraud. It is true that proof that the sale was made after the day fixed by law and without notice might, when taken in connection with other evidence, conduce to prove fraud. And if the defendant had proposed this in connection with other evidence for that purpose, the question would have arisen as to its admissibility in a common-law court upon a collateral issue. But the avowed object of the defendant was to falsify and disprove the return of the sheriff as to the time of the sale and the notice given. This, we have said, could not be done. And upon examination of the authorities cited by counsel, in which parol evidence was ad-

mitted to disprove the return of the officer, it will be found that in Tennessee such evidence was allowed to prove a want of notice, because the statute of that state declared the sale void without notice. And so also in Kentucky as to the quantity of land to be sold. The statute forbids the sale of more land than would pay the debt. This was a violation of a prohibitory, not a directory, statute. In the case of *Givan v. Doe*, 5 Blackf. 260, the strongest case referred to by counsel, the evidence was admitted to prove a fraud. And none of them are applicable to the state of case before us. The counsel has, in an ingenious argument, endeavored to bring them to bear upon this case, by assuming that if the sale should be proven to be on a day subsequent to the first day of the return term, it would be void, because the execution was not then in force, and conferred no power on the sheriff to sell, and that parol evidence was admissible to prove the sale void, as held in Tennessee, Kentucky, and Indiana. This ground was, we apprehend, taken under a misapprehension of the statute. It is true that the statute directs the sale to be made on the first day of the return term, but makes the writ returnable on the second day of the term: Dig., c. 67, sec. 9; and this, as appears from the defendant's own evidence, was the day on which the sale was in fact made, although returned by the sheriff as made on the first day of the term. A sale made on the return day of the writ is valid: *Blaisdell v. Sheafe*, 5 N. H. 201; *Tayloe v. Gaskins*, 1 Dev. 295.

The sale, then, was not void for want of power in the sheriff to sell; and as regards the irregularity in selling on a day different from that directing sheriff's sales and without notice, these are irregularities which arise in the exercise of power conferred. A departure by the officer from the statutory directions, as to the manner of executing his power, does not affect the title of a *bona fide* purchaser at sheriff's sale. This has been so repeatedly decided by this court that it may now be held as settled law: *Adamson v. Cummins*, 10 Ark. 541; *Byers v. Fowler*, 12 Id. 218 [54 Am. Dec. 271]; *Whiting v. Beebe*, Id. 421.

But even if a doubt could arise as to the correctness of these decisions in ordinary cases, it is very questionable whether this case would come under the rule as laid down by the authorities most favorable to the defendant's case; for the statute in regard to sales made after the property has been regularly advertised and bid off, and where the purchaser refuses to pay the sum bid, directs a resale, but is silent both as to the time and manner of

sale. No doubt the officer may, on the same day, reoffer the property for sale, and then there would be no necessity for notice; but suppose, as is no doubt the case in most instances, in counties where there is much litigation, that the sheriff should not find time after selling to hunt up the purchaser and make his settlement with him, or upon a refusal of the purchaser to pay the sum bid, to resell the property at once. It is evident that in many instances a large number of sales would be postponed by sham bids, procured to be made by irresponsible bidders, and if the sheriff is not allowed to sell the property on another day, it would result in incalculable delay and mischief. When, however, he comes to fix the day, the law is silent both as to time, place, and notice. Should he refer to the statute, he could derive no aid from it as a precedent, for it was certainly not intended to wait until the first day of the next succeeding term; nor as regards notice, that thirty days should be allowed; but on the contrary, of this the statute is silent, and by its other provisions seems to contemplate a summary sale, by which, however, the defendant and the plaintiff are both protected against ultimate loss, by holding the first bidder responsible over for any loss which may arise in case the property should not sell for as much at the second as it did at the first sale. Thus the first purchaser is made to stand between the defendant and loss occasioned by his refusal to pay the price for which the property sold at the appointed time by law and upon regular notice.

In the case under consideration, the defendant, by her attorney, was the first bidder to whom the property was struck off at a sale admitted to be in all respects regular. Upon a refusal of the attorney to pay the sum bid, the property, as appears by the sheriff's return, was thereupon at once resold, and as the defendant contends, it was sold the next day after. The second sale, then, was the result of the act of the defendant, who became, under the statute, responsible for any loss that might accrue by reason of the second sale. If loss then had accrued, it would have been his own fault, and upon his own responsibility. But in truth, no loss in this instance accrued, for the property sold for as much at the second as it did at the first sale, and consequently no injury resulted from the second sale.

If the officer, uninfluenced by the conduct of the purchaser, had abused his official power to the prejudice of the rights of the bank, he is responsible to her for damages, or if, by the combined action of the officer and the purchaser, a fraud has been perpetrated to the injury of the bank, she must apply to a

court competent to afford relief; but in a common-law court the validity of a sheriff's deed can not be questioned by parol evidence touching irregularities not affecting the power and authority in the officer to sell and execute such deed.

There is no doubt but that the circuit court erred in permitting parol evidence to be given to the jury to contradict the return of the sheriff and the recitals in the deed. And for this error the judgment of the Pulaski circuit court must be set aside and reversed, and the cause remanded for further proceedings to be had according to law, and not inconsistent with this opinion.

WATKINS, C. J., not sitting.

PAROL EVIDENCE INADMISSIBLE TO CONTRADICT SHERIFF'S RETURN: *McClelland v. Slingluff*, 42 Am. Dec. 225; *Bank of Gallipolis v. Domigan*, 40 Id. 475. For a discussion of the verity of a sheriff's return and its conclusiveness upon the parties to the record, see *Knowles v. Lord*, 34 Id. 525; *Mentz v. Hamman*, Id. 547; *Mitchell v. Lipe*, 29 Id. 116.

SHERIFF'S DEED CAN NOT BE COLLATERALLY IMPEACHED for any irregularity in his proceedings, or in the process under which he acts: *Ware v. Bradford*, 36 Am. Dec. 427; but a sheriff's deed is not conclusive evidence of the facts therein recited, but may be contradicted by parol: *Leskey v. Gardner*, 38 Id. 764. In the note to this case, the cases upon the question of sheriff's deeds as evidence are collected.

IRREGULARITIES OF OFFICER IN SALE UNDER EXECUTION, issued on a judgment in a case where the court had jurisdiction, do no more than make the sale voidable; they must be taken advantage of, if at all, in a direct proceeding: *Swiggart v. Harber*, 39 Am. Dec. 418, and note; *Minor v. President etc.*, 43 Id. 488—in this case the subject is discussed at some length by Sharkey, C. J.; *Maddox v. Sullivan*, 44 Id. 234; *Reed v. Austin's Heirs*, 45 Id. 336; see also *Casey v. Gregory*, 56 Id. 581, and note.

THE PRINCIPAL CASE IS CITED AND COMMENTED UPON in *Newton's Heirs v. State Bank*, 22 Ark. 19; *Hardy v. Heard*, 15 Id. 187; and *Fenter v. Obough*, 17 Id. 81.

RAWDON v. RAPLEY.

[14 ARKANSAS, 203.]

JUDGMENT OF SUPREME COURT AFTER TERM at which it was rendered has elapsed is final and conclusive.

JUDGMENT OF SUPREME COURT IS NOT SET ASIDE OR VACATED by a continuance of the cause and leave to file a motion for reconsideration and a written argument at the next term.

ERROR to the circuit court of Pulaski county. The facts are stated in the opinion.

Watkins and Curran, for the plaintiffs.

Pike and Cummins, for the defendants.

By Court, HEMPSTEAD, Special J. This was an action of debt, brought by the plaintiffs against the defendants on a recognizance conditioned in substance that the Real Estate Bank should prosecute with effect a writ of error which she had sued out in the case of herself against the present plaintiffs, and on which she had obtained a *supersedeas*, and pay the money that might be adjudged against her by the supreme court, or otherwise abide the decision of that court therein.

It appears that the judgment in that case was reversed on the twenty-second of August, 1842, and the case ordered to be remanded for further proceedings. On the twenty-seventh of August the defendants in error in that suit filed a motion for a reconsideration, and obtained leave to submit a written argument on or before the first day of the next term, to which term the case was continued. The opinion of the court was not recalled, nor the judgment set aside nor suspended. On the tenth of January, 1843, at the succeeding term, the petition for reconsideration was filed and taken under advisement, and on the seventh of July, 1843, at the following term, the cause was ordered to stand for rehearing, the judgment to be set aside, and it was then taken under advisement. On the seventh of August, 1844, the order of the seventh of July, 1843, was annulled, the petition for reconsideration refused, and the judgment of 1842 ordered to stand as the judgment of the court. On the ninth of August, 1844, this last order was set aside, and the cause was again submitted to the court, and was argued by counsel, and on consideration whereof the judgment of the circuit court was reversed, and ordered to relate back to and take effect as of the first day of the term.

This seems to be the present attitude of the suit, and certainly no examples could more forcibly demonstrate the evils which must result from attempts to disturb the judgments and decrees of courts of record, after the term at which they were pronounced has passed. It seems at one time to have been regarded as a question of practice in this court, resting upon the sound discretion of the judges. But difficulties of such a formidable character sprung out of the practice as to induce the judges to pause and investigate the question of power, and it was then announced as a true principle, that under our system of jurisprudence courts of record do not possess the power and authority to vacate, annul, reverse, or suspend their judgments and decrees after the term has passed: *Ashley v. Hyde*, 6 Ark. 100 [42 Am. Dec. 685]. And it was said in that case, that

“upon principle and precedent, when the supreme court once adjudicates a question, pronounces its opinion, renders judgment thereon, and the term elapses leaving the judgment in full force, the case passes forever beyond the jurisdiction of the court, except it again be brought up by appeal or otherwise, after another trial in the inferior tribunal.”

After a careful examination, we entirely approve of the doctrine in that case, and hold it to be the settled law of this court. So far indeed from being dissatisfied with it, we can not conceive on what possible grounds a different doctrine could be maintained, without converting courts of record into courts of original and appellate jurisdiction, and allowing them to pronounce judgments at one term and reverse them at another, and thereby exercise a power, neither inherent in nor delegated to them. As to this question, this court is not different from other courts. Indeed, as there is no tribunal to revise our acts, it is our imperative duty, in all cases, to avoid the exercise of all doubtful powers.

It can not be denied that there is a right inherent in the nature and organization of every court of record to amend judgments and process at any time, in order to attain the ends of justice and perfect the proceedings according to the truth as it existed at the time. And this right has its origin in the general power of the court to do justice, rather than in any statute of jeofails: *Mara v. Quin*, 6 T. R. 8; *Rex v. Mayor of Grampond*, 7 Id. 699; *King v. State Bank*, 9 Ark. 188.

But this is quite a different question from setting aside or vacating a judgment after the term has passed. The one is intended to perfect the proceedings and maintain the jurisdiction of the court, the other to destroy—the one is to uphold, the other to overturn.

The judgment of reversal rendered in the case of *The Real Estate Bank v. Rawdon*, 5 Ark. 559, at the July term, 1842, was not set aside nor recalled at that term. The leave to file a motion for reconsideration and a written argument at the next term, and the continuance of the cause, could not, in our opinion, have that effect. Nor was the judgment ever regarded by this court as having been set aside or suspended, because, on the seventh of July, 1843, a reconsideration was granted, and the judgment for the first time ordered to be set aside; and although this order was irregular, yet it serves to show that, up to that time, the judgment was considered as in full force.

In *Ashley v. Hyde*, 6 Ark. 92 [42 Am. Dec. 685], it was held

that the filing of a motion for leave to present a petition for rehearing or granting that leave by the court, or actually filing such petition, could not have the effect of suspending the judgment of the court. This we regard as a decisive authority on the present question: because, although a continuance was ordered in the case of *The Real Estate Bank v. Rawdon*, and none in the case just quoted, yet it will readily occur to any one that that is an immaterial circumstance, and can not affect the principle decided. The two cases are similar, and identical in substance; because, to grant leave to file a petition for rehearing at a future term would seem to be equivalent to a continuance of the cause to that term, for otherwise the leave could not be made available. That the court might have intended to set aside or suspend the judgment rendered in 1842 may be admitted, but that it was done either directly or indirectly, or that any act equivalent to it was performed at that term, is a proposition which can not, in our opinion, be maintained.

We are compelled by precedent and principle to declare that the judgment of the supreme court in the case of *The Real Estate Bank v. Rawdon*, rendered the twenty-second of August, 1842, was a valid and binding judgment, not reversed, vacated, nor suspended, and that all the action and orders and proceedings of the supreme court with regard thereto, subsequent to the term at which the judgment was pronounced, were nullities, possessing no judicial sanction, the jurisdiction over the subject-matter being exhausted at that term, as was held by this court in the late case of *Cossitt v. Biscoe*, 12 Ark. 95.

It may not be amiss to remark that we can not perceive any ground for a reconsideration, and if the judgment of the circuit court was now directly before us for revision, we should have no hesitation in reversing it, as did the old court, because it is clear enough from all the facts that the present plaintiffs in error gave credit to and looked to Williamson, the agent, for payment, doubtless preferring his responsibility to that of the bank; and their remedy was not against the bank, but Williamson individually: *Real Estate Bank v. Rawdon*, 5 Ark. 558.

It only remains for us to say, that as the judgment of 1842 was valid, binding, and unreversed, it follows as a necessary consequence that the writ of error was prosecuted with effect, and the condition of the recognizance performed. While the defendants in error, as sureties, are to be held to their engagements, yet their liability is not to be extended by implication; and as it appears on the merits that they are not liable, the

court correctly found for them, and discharged them by its judgment.

Other questions discussed by counsel with great ability we do not deem it necessary to investigate or decide on the present occasion, contenting ourselves with affirming the judgment of the circuit court, as on the whole record we consider it to be right.

Affirmed.

WATKINS, C. J., not sitting.

POWER OF COURT TO SET ASIDE JUDGMENT RENDERED AT PREVIOUS TERM: See *Reynolds v. Stansbury & Burch*, 55 Am. Dec. 459, and note.

THE PRINCIPAL CASE IS CITED to the point that after the term at which a judgment was rendered has passed, the judgment must stand as the judgment of the court forever, in *Biscoe v. Sandefur*, 14 Ark. 572, and *Brooks v. Hanauer*, 22 Id. 176.

FLOYD v. RICKS.

[14 ARKANSAS, 286.]

BY PURCHASING LAND FROM UNITED STATES, the purchaser acquires title to all improvements and crops growing thereon, whether severed or unsevered. Consequently, a mere possessor of public land who has planted a crop thereon can not maintain trespass against a purchaser who enters and removes such crop.

COURT WILL TAKE JUDICIAL NOTICE that in the general course of agriculture and the seasons of the year a crop will not be ready to harvest by the tenth of August.

GENERAL ISSUE IN TRESPASS PUTS IN ISSUE BOTH FACT OF TRESPASS AND TITLE OF PLAINTIFF. It follows that any title, whether freehold or possessory, in the defendant is admissible in evidence; and for this purpose a certificate of the register of the land office that the defendants had located the land upon which the alleged trespass occurred is competent evidence.

UNRECORDED AND UNACKNOWLEDGED DEED passes the title as between the parties.

DEED TAKES EFFECT FROM ITS DELIVERY.

DEED WITHOUT SEAL CAN NOT OPERATE TO PASS LEGAL TITLE; but such deed, if sufficiently proved, should be admitted on behalf of defendant in trespass, and is competent to show at least that the grantee had lawful license to enter upon the premises therein attempted to be conveyed.

INSTRUCTIONS SHOULD NOT ASSUME FACTS as proved, but should be hypothetical; nor should instructions be given based upon evidence rejected by the court.

TRIAL COURTS SHOULD NOT FALL INTO PRACTICE of regarding motions for new trial as mere matters of form. The means of doing justice are more extended in those courts, and further errors should be corrected by the court in which they were committed.

APPEAL from the circuit court of Calhoun county. This is an action of trespass *quare clausum fregit* for entry upon lands and removing growing crops therefrom. The defendants pleaded not guilty and *liberum tenementum*. It appears that the land upon which the alleged trespass was committed was government land of the United States, and that the plaintiff below had planted and was cultivating a crop thereon. In August, 1848, defendants purchased this land. The case was tried before a jury, and defendant, for the purpose of establishing his ownership of the land, offered in evidence a certificate of the receiver of the land office, stating that on the tenth day of August, 1848, he purchased and located the land. Plaintiff objected to the introduction of this certificate in evidence, and the court sustained his objection. Defendants also offered in evidence a deed from James M. Floyd to A. J. Floyd, executed before two witnesses, but which was unrecorded and unacknowledged. The court sustained plaintiff's objection to the introduction of this deed in evidence. The court instructed the jury—3. That if defendants had entered the land in the land office at the time of the alleged trespass, although plaintiff was living thereon at the time, they should find for defendants; 4. That if Andrew J. Floyd entered with the permission and at the command of James M. Floyd, they should find for defendants; 7. That if defendants purchased said land from the United States while the crop was growing thereon, they were entitled to the crop. The jury returned a verdict for plaintiff, and from an order denying a new trial defendants took this appeal.

Curran, for appellants.

By Court, HEMPSTEAD, Special J. The most material inquiry in this case is, whether a person who settles on public land and plants a crop can maintain trespass *quare clausum fregit* against one who subsequently purchasing the land from the United States enters for the purpose of gathering and converting such crop to his own use. And although the question is not free from difficulty, yet on principle and authority we think it must be answered in the negative.

In *Boyer v. Williams*, 5 Mo. 335 [32 Am. Dec. 324], it was held that a purchaser from the United States was entitled to all crops growing upon the land at the time of purchase. And in *Rasor v. Qualls*, 4 Blackf. 286 [30 Am. Dec. 658], it was decided that where a person having a pre-emption right to a tract of land permitted the time to expire without making the purchase,

a stranger who afterwards purchased the land from the United States was entitled to the growing crop. And on a like principle it has been decided by the supreme court of Illinois in *Carson v. Clark*, 1 Scam. 114 [25 Am. Dec. 79], and the supreme court of Mississippi in *Merrell v. Legrand*, 1 How. (Miss.) 150, and by this court in *McFarland v. Mathis*, 10 Ark. 560, that a promise made by a purchaser of public land after entry to pay an occupant for improvements made prior to the entry is without consideration and void. Every valid contract must be founded on a sufficient consideration, and these cases rest on the ground that the occupant has no right of property in the crop or the improvements as against the alienee of the government, and therefore can not recover in any action.

The case of *Turley v. Tucker*, 6 Mo. 583 [35 Am. Dec. 449], is an express authority to the point that an occupant of the public land has not such an interest in timber cut by him as to enable him to maintain an action of trover against one who takes the timber away and converts it to his own use.

If there is no reservation or stipulation to the contrary, a conveyance of land carries with it the growing crops, or, as expressed by Spencer, J., in *Foote v. Colvin*, 3 Johns. 222 [3 Am. Dec. 478], "the ownership of the land draws after it that of the crops, and it can not admit of a doubt that a sale of the land simply, by the owner both of the land and crop, carries the property of the crop to the purchaser:" *Crews v. Pendleton*, 1 Leigh, 305 [19 Am. Dec. 750]; *Wilkins v. Vashbinder*, 7 Watts, 378. And in *Gibbons v. Dillingham*, 10 Ark. 13 [50 Am. Dec. 233], this court held the same doctrine, saying that "the authorities are full and clear upon the point that where a party executes an absolute deed in fee of the soil and without an express reservation of the growing crop, his interest in such crop also passes by such conveyance."

A sale by the United States falls within this general rule. The land with the improvements and crop passes to the purchaser: *Carson v. Clark*, 1 Scam. 115 [25 Am. Dec. 79]; *Boyer v. Williams*, 5 Mo. 335 [32 Am. Dec. 324]; and we think it can make no difference whether the crop is severed or not. In either event it belongs to the owner of the soil, and such is the doctrine of adjudged cases, which we think is maintainable on the principles of reason. Congress is invested by the constitution with the power of disposing of and making needful rules and regulations respecting the public domain. In the exercise of this power land offices have been established, officers appointed,

the mode and manner of sales of the public domain regulated, and the manner by which the United States may be divested of the legal title prescribed. Now, every man is presumed to be acquainted with the law, and hence the settler on the public land is bound to know that when the land upon which he may reside comes into market agreeably to the laws and regulations of the United States, a stranger has the right to purchase it, and thus become the owner in fee simple, unincumbered by any claim on the part of the settler. And he is further bound to know that the absolute ownership of the soil necessarily draws along with it the right to the crop, and emblements produced from it, whether severed or not, and all improvements on the land. The settler having nothing beyond a mere naked possession, with no interest in the soil, if he plants what he can not enjoy, or puts improvements on the land and loses them, it is in both cases his own folly, and certainly he ought not to be heard to complain of hardship which he voluntarily brought on himself, and against which he might have guarded by becoming the purchaser, and thus merge his occupancy in a superior title. He is bound to know that the land may be purchased by a stranger at any moment; and it may not inaptly be compared to the case of a tenant who sows a crop which can not mature before the expiration of his lease, and who loses it for the reason that it is his own folly to sow when he knows that his term must expire before harvest: 4 Kent's Com. 109.

But even if it were true that it is only the unsevered crop that would pass, it would not affect this case, because it appears from the certificate of the register of the Champagnolle land district offered, and which should have been received in evidence, that the land upon which the corn crop was planted by Ricks was entered by James M. Floyd, one of the defendants, on the tenth day of August, 1848, and this court taking judicial notice of the seasons and of the general course of agriculture, know that the crop could not have matured at that date so as to be severed, and consequently the severance must have been after that period. And this, too, may be fairly inferred from the proof. It follows, then, in any event, that on that day Floyd, becoming the owner of the land in fee simple, by purchase from the United States, was entitled to the crop, and Ricks had no right or authority to enter or interfere with the land or crop.

The certificate of the register of the land office was competent evidence. By force of statutory provisions it is sufficient title to maintain ejectment, and of course is sufficient to establish title

either in the prosecution or defense of any action: Dig. 454. This question was settled in *McClairén v. Wicker*, 8 Ark. 195, in favor of the admissibility of the certificate, and that case is well sustained by authority: *Morton v. Blankenship*, 5 Mo. 356; *Jackson v. Wilcox*, 1 Scam. 344; S. C., *Wilcox v. Jackson*, 13 Pet. 516; *Bullock v. Wilson*, 5 Port. 338.

The statute not requiring any authentication, it is an instrument of evidence which proves itself: *Cox v. Jones*, 1 Stew. 379; and the court erred in rejecting it; because the general issue was pleaded, which put in issue not only the fact of the trespass, but also the title or right of the plaintiff. It follows that any title, whether freehold or possessory, in the defendants might be given in evidence under "not guilty," if such title showed that the right of possession, which is necessary to support trespass, was not in the plaintiff, but the defendant: 1 Ch. Pl. 538. Also, "the defendant may," says Judge Tucker, "under the general issue, give evidence that the right of freehold is in a third person, for this proves he had not trespassed on the plaintiff:" 2 Tucker's Com. 190. In trespass to real property, whatever will show that the defendant did not commit a trespass on the close in question at all, or that such close was not the plaintiff's, may be given in evidence under "not guilty:" 9 Bac. Abr., Trespass, I. And it is further said in that book, that the general issue will be applicable if the defendant did break and enter the close, but it was not in possession of the plaintiff, or not lawfully in his possession, as against the better title of the defendant; for, as the declaration alleges the trespass to have been committed on the close of the plaintiff, "not guilty" involves a denial that the defendant broke and entered the close of the plaintiff, and is therefore a fit plea if the defendant means to contend that the plaintiff had no possession of the close sufficient to entitle him to call it his own: *Id.*, K. 544; Stephens' Pl. 178, 179.

It will be perceived that the certificate was admissible under this plea, because it proved that the freehold was not in the plaintiff, and that he had no right to recover in the action, or by any form of pleading.

The defendants offered in evidence an instrument of writing, executed by James M. Floyd, in the presence of two subscribing witnesses, purporting to convey to Andrew J. Floyd the "undivided half" of the tract of land mentioned in the certificate, and offered to prove its execution and delivery by one of the subscribing witnesses, on a day previous to the alleged tres-

passes, but the court refused to permit such proof to be made, and excluded the instrument.

It is a proposition not to be disputed, that a deed delivered passes the title, as between parties, although it is neither acknowledged nor recorded: *Fitzhugh v. Croghan*, 2 J. J. Marsh. 433, 434 [19 Am. Dec. 139]; *Turner v. Stip*, 1 Wash. (Va.) 319; *Marshall v. Fisk*, 6 Mass. 30 [4 Am. Dec. 76]. In *Jackson v. Post*, 9 Cow. 123, it was said by Sutherland, J., in delivering the opinion of the court, that "as between the parties to a conveyance, the recording of it was not necessary to give it legal force and efficacy. It divested the grantor of all his interest in the land, and transferred it to the grantee."

Such a deed can not prevail against creditors and purchasers without notice. But notice of an unrecorded deed is equivalent to a record of it, and will necessarily destroy the effect of a subsequent registered deed, because one object of the registry acts is to give notice to subsequent purchasers, and if they have such notice without registry, that is all that can be required: *Jackson v. Burgott*, 10 Johns. 461 [6 Am. Dec. 349]. Our statute concerning conveyances provides for the acknowledgment or proof, and recording of deeds: Dig. 265; but there is nothing to indicate that an unrecorded deed shall be void, but on the contrary, a clear intention is manifested that it should be entirely effectual to pass the estate, as between the parties and their representatives. The position of the counsel of the appellants, that the only benefit to be derived from having a deed recorded is to dispense with the necessity of proof of execution, and to give precedence over subsequent purchasers and creditors, is deemed to be a sound interpretation of the registry acts.

This instrument was without date, but a deed takes effect from delivery: 4 Kent's Com. 454; and the offer was to prove delivery at a day anterior to the alleged trespasses.

But on examination of this instrument, we find that it lacks one important requisite of a deed: it does not appear to be sealed, and although this may be a clerical misprision, still we must take it as we find it in the transcript. The very term "deed" implies a sealed instrument. Sealing at common law was an impression on wax, or wafer, or some other tenacious substance capable of being impressed: 3 Inst. 169; 4 Kent's Com. 452; but here that is not necessary, our statute declaring that every instrument of writing expressed on the face thereof to be sealed, and to which the person executing the same shall

affix a scroll by way of seal, shall be deemed and adjudged to be sealed: Dig. 931. The statute is only cumulative, and the common-law mode would still be good. But this instrument, being destitute of either, could not, in our opinion, operate to pass the legal estate. But the court should have allowed the proof, and if sufficient, have admitted the instrument, because there can be no doubt that it would be competent evidence, under the general issue, to at least show that the grantee had lawful license and authority to enter on the freehold, derived from the owner, and could not therefore be guilty of trespass any more than the legal owner of the freehold himself.

It is not conceived important to discuss the instructions given or refused, because we think it appears distinctly that the close mentioned in the declaration was not the close of the plaintiff, that he neither had the right of possession nor property, and therefore any instruction predicated upon the idea of his right to recover would be in their nature improper. Aside from that, the first and third instructions given for him are objectionable, because they assume the alleged trespasses to have been proved; and whether they were or not, was a fact to be found by the jury, and which the court had no right to assume as established. Instructions should be hypothetical, and embody in plain and succinct language the true principles of law applicable to the facts as developed on trial; but not assume facts to be proved, because that is an invasion of the province of the jury. Eight instructions were asked by the defendants, two of which were given and the rest refused. These instructions were based mainly, if not entirely, on the rejected testimony, and should not have been asked; but the defendants ought to have stood on their exceptions to the rejected testimony. A party has no right to instructions looking to or based on such testimony, because the instructions are just as abstract as if no testimony had been offered and rejected. If the testimony, which the court improperly excluded, had been before the jury, the fourth, fifth, and seventh instructions asked would have fairly presented the law of the case, and the others would have been unnecessary, and might for that reason have been refused. To multiply instructions and put ideas in every conceivable phase is a highly objectionable practice, because it increases the labor of the court, and has a tendency to confound the jury, by making the impression on their minds that instead of one or two they have many and difficult issues to decide.

These instructions would necessarily put an end to the case

and accord with the law; for a person having a right to enter on land is not liable in an action of trespass for entering even with force: *Wilde v. Cantillion*, 1 Johns. Cas. 123; *Hyatt v. Wood*, 4 Johns. 150 [4 Am. Dec. 258]; *Ives v. Ives*, 13 Id. 236; *McDougall v. Sitcher*, 1 Id. 44. No person can recover upon a claim of right to property against another whose rights to the subject-matter are superior to those of the person so claiming damages for a violation of his supposed rights. If the entry is violent and with a multitude of people, it may be an offense for which the party so entering must answer criminally; but it would be an absurdity to say that he must also be responsible in damages, as for an injury to a person who has no right: *Per Spencer, J.*, in *Hyatt v. Wood*, 4 Johns. 158 [4 Am. Dec. 258].

In *Tribble v. Frame*, 7 J. J. Marsh. 601 [23 Am. Dec. 439], it is said that at the common law a person holding the title to land, and having the right of entry, might use actual force, if necessary, for overcoming any forcible resistance; because his right of entry being perfect, no other person could lawfully resist him in the exercise of his perfect right. Now, the right of entry in Floyd was perfect from the tenth of August, 1848, and Ricks could not rightfully oppose it; and the entry on the land as actually made by the Floyds seems to have been peaceable and orderly, and intended to secure and preserve the crop; most of which, however, was taken away by Ricks, who had no right to it. The court should have granted the motion for a new trial on the ground of the improper exclusion of the evidence before alluded to.

This is a fit opportunity of adverting to a practice which seems to have become prevalent in inferior courts, as it regards new trials. A motion for a new trial, in many instances, appears to be regarded as a matter of form, and as a mode of saving the points accruing at the trial, and of putting a case in a proper attitude to be reviewed by this court. The party usually expects no benefit from it in the inferior court, and as it is made without hope, it is denied without due investigation.

In view of the zeal of suitors, the want of time for deliberation, especially as to complicated questions, and the usual circumstances attending a trial at *nisi prius*, it is no imputation against the learning and ability of the respective presiding judges in those courts to say that errors are almost unavoidable. But upon more mature deliberation they may and ought to be corrected in the tribunal where they were committed, without forcing the unsuccessful party into this court for redress. And

the means of doing justice are more extended in the inferior than in this court, because, as it is the duty of the judge there to observe and note the testimony and points during the progress of the trial, he is presumed to do so, and is through that medium cognizable of the whole case from beginning to end; the demeanor of the witnesses, and other circumstances calculated to have an influence on the verdict. A motion for a new trial places the law and facts before him, unembarrassed by any question of power, and he is more likely to be able to correct injustice than an appellate court, because the latter acts only on questions of law, and can not act on matters of fact, or disturb a verdict on the mere weight of evidence.

Reversed.

WATKINS, C. J., not sitting.

CROPS GROWING ON PUBLIC LANDS, RIGHT TO.—The cases of *Boyer v. Williams*, 32 Am. Dec. 324, and *Rason v. Qualls*, 30 Id. 658, cited in the opinion above, appear to be decisive of the question that growing crops pass to the purchaser of government land, no matter by whom planted. As to what persons respectively, under certain circumstances, are entitled to crops growing upon land, see *Brittain v. McKay*, 35 Id. 738, and note.

PLEAS IN ACTION OF TRESPASS QUARE CLAUSUM FREGIT.—Plea that entry was by license of owner is a good defense to trespass *quare clausum fregit*: *Rason v. Qualls*, *supra*; but it is no defense to such action that the title to the close is in some other person than the plaintiff, unless defendant justify under such other person: *Finch's Ex'r v. Alston*, 23 Am. Dec. 299. Under general issue in trespass *quare clausum fregit*, evidence of title as well as of possession in the plaintiff is unquestionably admissible: *Hunter v. Hatton*, 45 Id. 117. *Liberum tenementum* is a sufficient plea in justification in an action of trespass *quare clausum fregit*: *Crockett v. Lashbrook*, 17 Id. 98; *Tribble v. Frame*, 23 Id. 439; *Wilson v. Bibb*, 25 Id. 118.

UNRECORDED DEED DULY EXECUTED AND DELIVERED PASSES TITLE: *Philips v. Green*, 13 Am. Dec. 124. That a deed takes effect only from delivery, see note to *Gant v. Hunsucker*, 55 Id. 408.

COURT IN CHARGING JURY HAS NO RIGHT TO EXPRESS OR INTIMATE HIS OPINION as to what has or has not been proved during the trial: *Beverly v. Burke*, 54 Id. 351.

THE PRINCIPAL CASE IS CITED to the point that instructions to the jury should be hypothetical, predicated upon the supposition that the jury find certain facts to be proved or disproved, in *The State Bank v. McGuire*, 14 Ark. 530. See also *Aikins v. The State*, 16 Id. 568. It is also cited *arguendo* in *Brock v. Smith*, 14 Id. 431.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

LICK v. O'DONNELL.

[3 CALIFORNIA, 59.]

DEED TO "ONE HALF OF MY LOT" MAY NOT BE VOID FOR UNCERTAINTY,
if it can be established by parol that the grantor owned but one lot at the
time of its execution.

GRANTOR BECOMES TENANT IN COMMON with one to whom he has conveyed
"one half of my lot."

ONE TENANT IN COMMON CAN NOT MAINTAIN ACTION FOR FORCIBLE
ENTRY and unlawful detainer against his co-tenant; but in order to ob-
tain relief, must resort to a court of equity for a partition of the land in
dispute.

ACTION for forcible entry and detainer, originally brought be-
fore a justice of the peace. The complaint alleges that plaintiff
Lick was the owner of certain premises, that he leased them to
one Martin, and that defendant Hugh O'Donnell entered, and
holds said premises under Martin, and that he refuses to deliver
up the possession to plaintiff, although notified to do so, etc.
Defendant filed a plea, claiming ownership in the lot, and asking
that the case be removed into the district court, which petition
was granted. After the removal of the case, defendant in his
answer denied all the allegations of the complaint, and specially
that plaintiff was the owner of the lot, or that he had leased the
same to Martin. At the trial, it was admitted by both parties
that the lot was owned by Antonio Bujan on the fifteenth of
May, 1846. Defendant offered in evidence a deed from Bujan
to O'Donnell, to the western half of the premises in dispute (lot
34), dated the fifteenth of April, 1850, and recorded August 5th
of that year. Plaintiff offered in evidence a Spanish deed to

one Francisco Ramirez, which was translated, and purported to convey "one half of my lot," etc., dated May 15, 1846, and signed by Antonio Bujan. Defendant objected to the introduction of this deed, because of the vagueness of the description of the property sought to be conveyed; but upon the offer of plaintiff's counsel to introduce other evidence tending to show that it applied to the property in dispute, it was admitted by the court, with the reservation that in case said testimony was not satisfactory it might be stricken out. Plaintiff then offered in evidence the deposition of Antonio Bujan, for the purpose of showing that at the time of the execution of the above deed he owned but one lot in Yerba Buena (San Francisco), and that that was lot 34. Various points were made by counsel, and numerous exceptions taken, but the facts as considered by the court were substantially as above stated. Verdict for plaintiff, and defendant took this appeal.

Hall McAllister, for the respondent.

By Court, MURRAY, C. J. This was an action commenced under the statute concerning forcible entries and unlawful detainers, and transferred to the district court upon an affidavit of title. There is no evidence in the record showing that O'Donnell entered into possession under Lick.

The deed from Bujan to Ramirez, under whom Lick claims, calls for "one half of my lot." Parol evidence was admitted in the court below to prove that at the time Bujan executed said deed he owned but one lot in San Francisco, viz., lot 34. Admitting this deed is not void for uncertainty, it can only convey an undivided half of said lot. The exact portion conveyed is not set forth by any metes or bounds by means of which it can be separated or distinguished from the remainder. It therefore follows that Ramirez took as tenant in common with Bujan, and Bujan having afterwards sold his remaining interest to O'Donnell, Lick, the present plaintiff, who claims under Ramirez from Bujan, and O'Donnell hold as tenants in common, being seised for themselves and for each other; consequently, this action can not be maintained against O'Donnell.

Before the plaintiff can obtain any relief, he must resort to a court of equity for a partition of the land in dispute.

Judgment reversed, with costs.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN UNCERTAIN DESCRIPTION IN DEED: *Morton v. Jackson*, 40 Am. Dec. 107, and note 109, citing many cases. See also *Dow v. Jewell*, 45 Id. 371; *Harmon v. James*, Id. 296.

TENANCY IN COMMON IS CREATED BY TRANSFERRING PART INTEREST IN PROPERTY: Freeman on Cotenancy and Partition, sec. 93. The principal case is cited to the point that by granting a given quantity of land, parcel of a larger tract, without specifying what portion, the grantee becomes tenant in common with the grantor, in *Schenk v. Evoy*, 24 Cal. 104; and to much the same point in *Lawrence v. Ballou*, 37 Id. 520.

FORCIBLE ENTRY AND UNLAWFUL DETAINER BETWEEN CO-TENANTS: See Freeman on Cotenancy and Partition, sec. 295. Trespass between co-tenants, when can be maintained: See *Porter v. Hooper*, 29 Am. Dec. 480, and note; *Welch v. Clark*, 36 Id. 368; *Anders v. Meredith*, 34 Id. 376; *Odiorne v. Lyford*, 32 Id. 387, and the cases cited in the notes to above cases.

SUROCCO v. GEARY.

[3 CALIFORNIA, 69.]

AUTHORITIES OF CITY WHO CAUSE TO BE BLOWN UP OR DESTROYED any building therein situated, for the purpose of preventing the spread of a conflagration, are not liable in damages to the owner thereof.

BUILDINGS ON FIRE OR THOSE TO WHICH FLAMES ARE ABOUT TO BE COMMUNICATED are nuisances, which it is lawful to abate. The private rights of the owners in such case must yield to the public convenience and the interests of society.

DESTRUCTION OF BUILDING TO PREVENT SPREAD OF CONFLAGRATION is not "a taking of private property for public use," within the meaning of the constitution requiring compensation to be made in such cases.

NECESSITY OF TEARING DOWN BUILDING TO PREVENT SPREAD OF CONFLAGRATION must be judged of by the party so doing, regulated by the exigencies of the case, and must be clearly shown. If the building is torn down without actual or apparent necessity, the party would be liable in an action of trespass.

PROOF THAT HOUSE WOULD HAVE BEEN CONSUMED HAD IT BEEN LEFT STANDING is sufficient to establish the necessity of tearing it down to prevent the spread of a conflagration.

PARTY CAN NOT RECOVER FOR VALUE OF GOODS WHICH HE MIGHT HAVE SAVED from a building destroyed to prevent the spread of a fire. The goods are as much subject to the necessities of the occasion as the building in which they are situate.

DEFENDANT Geary was alcalde of the city of San Francisco, and in June, 1849, caused the house of plaintiff to be blown up with gunpowder for the purpose of preventing the spread of a fire then raging in that city. It appeared at the trial, upon the question of the necessity of blowing up the building, that the fire reached the site of the building a few minutes after its destruction, and that unless it had been so destroyed it would surely have been consumed. The court below found for plaintiff, and defendant took this appeal.

Dwinelle and Holt, for the appellant.

No brief on file for the respondent.

By Court, MURRAY, C. J. This was an action commenced in the court below to recover damages for blowing up and destroying the plaintiff's house and property during the fire of the twenty-fourth of December, 1849.

Geary, at that time alcade of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof that the fire passed over and burned beyond the building of the plaintiffs, and that at the time said building was destroyed they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more if not all of their goods.

The cause was tried by the court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the practice act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

This point has been so well settled in the courts of New York and New Jersey that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property to prevent the spread of a conflagration has been traced to the highest law of necessity and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest for the safety of a vessel; with the trespassing upon the lands of another to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quoad jura privata*."

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity: See *American Print Works v. Lawrence*, 1 Zab. 248, and the cases there cited.

This principle has been familiarly recognized by the books

from the time of the *Case of the Prerogative of the King in Saltpeter*, 12 Co. 13; and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defense of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the constitution.

The right of taking individual property for public purposes belongs to the state by virtue of her right of eminent domain, and is said to be justified on the ground of state necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the state.

The counsel for the respondent has asked, Who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest and the hope of saving his property, as to others. In all such cases, the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons, but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The legislature of the state possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs can not recover for the value of the goods which they might have saved; they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen that the delay caused by the removal of the goods would render the destruction of the house useless.

The court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.

Judgment reversed.

HEYDENFELDT, J., concurred.

DESTRUCTION OF PROPERTY IN CASE OF FIRE.—“The rights of property must in many cases be made subservient to the public welfare. On this ground rests the right of public necessity which is recognized as part of our law. In the exercise of this right houses may be razed to prevent the spread of a conflagration, and no action lies at common law by the individual who sustains injury thereby.” Note to *Hale v. Lawrence*, 47 Am. Dec. 190, note 207. Nor are municipal corporations liable for the acts of their officers in tearing down buildings for the above purpose: *Id.* In this note the question of statutes authorizing destruction of property in case of fire is discussed. See also *City Fire Ins. Co. v. Corlies*, 34 Id. 258. The case of *American Print Works v. Lawrence*, 3 Zab. 590; S. C., 57 Am. Dec. 420, is a leading authority upon this question, and harmonizes with the principal case.

CAVILLAUD v. YALE.

[3 CALIFORNIA, 108.]

DECLARATION AGAINST ATTORNEY FOR NEGLIGENCE NEED ONLY STATE generally that he was retained, without averring specially that any retainer fee was paid.

DECLARATION AGAINST ATTORNEY FOR NEGLIGENCE, which alleges that he was retained in consideration of certain fees and rewards to be paid him, should state the time at which such payment should be made, as in the

absence of an agreement to the contrary an attorney is always entitled to his retainer fee in advance. The payment of such fee should be alleged as positively as the performance of any other condition precedent.

THE complaint in this case alleges that the defendant was employed as an attorney to take and perfect a certain appeal, for certain reasonable fees and rewards therefor to be paid to him; that he accepted and entered upon such retainer and employment; that he neglected his duty in said matter, without notice to plaintiff, whereby said appeal was dismissed, etc. Defendant demurred to this complaint, upon the ground that it did not show that plaintiff ever paid defendant any compensation or reward for the alleged services agreed to be performed. This demurrer was overruled by the district court, and defendant appealed.

Field and Townsend, for the appellant.

Swezey, for the respondent.

By Court, HEYDENFELDT, J. The demurrer to the declaration was well taken. In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained, without stating specially that a retaining fee was paid. But the averment here goes further, and shows that the employment or engagement of the defendant was in consideration of certain reasonable fees and rewards to be paid him. No future time is stated as having been agreed upon for the payment of the fee, and the inference must be that it was to be paid before the services were rendered, because an attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. Therefore, the declaration averring that the fee was to be paid should also have averred the payment, as distinctly as the performance of any other condition precedent is necessary to be stated.

Judgment overruling demurrer is reversed, with costs.

WELLS, J., concurred.

BURNHAM v. HAYS.

[3 CALIFORNIA, 116.]

COURT HAS LEGAL DISCRETION TO ALLOW AMENDMENT OF COST BILL and the affidavit accompanying it, under the sixty-eighth section of the practice act, and party can not say that this discretion has been abused when it resulted in the reduction of the amount of the costs as to him.

TIME WITHIN WHICH TO FILE COST BILL IS NOT ENLARGED, after the expiration of that time, by granting leave to amend a bill duly filed, as the amendment relates back to the time of filing the original of which it is a part.

IF ORIGINAL AFFIDAVIT TO COST BILL BE NULLITY, defendant should treat it as such, and take the proper steps to set it aside; but by moving to retax, he brings it before the court of his own motion, and it is proper for the court to grant leave to amend said bill, or to make such other order as in its discretion it deems necessary.

AFFIDAVIT TO BILL OF COSTS can be made by the attorney of the prevailing party, under the statute.

ALL SECTIONS OF ACT SHOULD BE CONSTRUED TOGETHER, and each section should receive such a construction as will make it conform to common sense and justice.

THIS appeal is taken from the action of the superior court in allowing and entering up judgment upon a certain cost bill. The case in which the costs accrued was tried in May, 1852, and on the fifth day of that month a verdict was rendered for the plaintiffs therein for four thousand dollars, and four hundred and nine dollars and eighty cents costs and disbursements. On the sixth day of May a cost bill was filed, the items of which amounted to four hundred and nine dollars and eighty cents, and an affidavit was appended thereto which stated substantially that "G. W. Beck, being duly sworn, deposeth and saith that the above bill of costs is true and correct to his best knowledge and belief," which was signed and sworn to. Beck was the attorney for the plaintiff. On the twenty-second day of May defendant moved the court to retax this cost bill, and this motion was argued by the respective counsel. May 26th the court granted leave to the plaintiff to amend his bill and his affidavit thereto. Plaintiff did so, and on the same day filed his amended cost bill in the court, by which he reduced the amount of said bill twenty dollars. The affidavit was also corrected so as to include the statement that "the items of the foregoing bill of costs are correct, to his best knowledge and belief, and that the disbursements have necessarily been incurred in this action," which statement it appears the statute required. This affidavit was also made by Beck. This appeal is taken by the defendant from the order of the court of May 26th, allowing plaintiffs' counsel leave to amend.

Burham and Reed, for the appellants.

Clark, Taylor, and Bickle, for the respondents.

By Court, WELLS, J. Upon an examination of this case, on rehearing, I am satisfied that the decision heretofore rendered

by this court by my associates was correct, and should be adhered to.

The court below, in allowing the plaintiff to amend his bill of costs, and the affidavit accompanying it, exercised a legal discretion which it was competent for it to do, by virtue of the sixty-eighth section of the practice act, and the defendant can not say that such discretion was abused, inasmuch as it resulted to his benefit by the reduction of the amount of charges against him. Nor can it be said that the allowing of such amendments was an enlarging of the time fixed by statute for the delivering of the memorandum and affidavit to the clerk. The original memorandum and affidavit were delivered within the time specified, and the filing of the amendments related back to the time of filing the originals, of which they merely formed a part. This was not an enlarging of the time such as was contemplated by the decision in the case of *Jackson v. Wiseburn*, 5 Wend. 136; and therefore the rule in that case does not apply.

If the original affidavit was a nullity, and the defendant intended to take advantage of it, he should have treated it as such, and have taken proper steps to set aside the judgment, or appealed therefrom, on the ground that the costs had been waived by operation of the statute; but having moved for a re-taxation of the costs, and the bill being upon his own motion before the court for that purpose, it was proper that such order should be made and such amendment allowed as in the discretion of the court was just and necessary in the premises.

It is objected that the amended affidavit is equally void, it not having been sworn to by the party, as required by the statute, but by one of his attorneys, and we are referred to several other sections of the practice act to show that in every instance where an oath is not made by the party himself, the statute expressly authorizes some other person to make it; but this fact, instead of sustaining the objection, affords a good reason why, in this instance also, the affidavit may be made by some person other than the party, by his attorney, or some one else, in his behalf, who had knowledge of the facts. In construing the statute, we must consider the sections together, and that interpretation should be placed upon the language which will give the particular section utility and effect, and which at least will make it compatible with common sense and the plainest dictates of justice. Such a construction as the defendant would have placed upon it would render this section in most cases impracticable; in many, unjust; in some, inoperative and nugatory; and in all,

inconvenient. It would deprive an absent or non-resident party entirely of his right. Indeed, it would operate as a denial of such right to every party, unless he was prepared to swear to a bill of costs, of the correctness of which he could seldom by any possibility have the remotest personal knowledge. The fees and disbursements expended in the preparing of a cause for trial, and in the trial and general management of it, are almost universally paid out by the attorney; and how can another party be supposed to know what amounts are thus paid? It would be a novel thing to require a party in all cases to swear to the correctness of the items of his attorney's bill of costs. Such a thing was never required by any law that was ever heard of before, and such as I can not admit was intended by any legislator in his senses who had a voice in framing the act under consideration.

HEYDENFELDT, J., concurred.

AMENDMENTS ARE LARGELY WITHIN DISCRETION OF NISI PRIUS COURT; but this is a legal discretion, which if abused will be corrected on appeal: *Robbins v. Treadway*, 19 Am. Dec. 152.

STATUTES IN PARI MATERIA SHOULD BE CONSTRUED TOGETHER as if they were but one act: *McCartee v. Orphan Asylum Soc.*, 18 Am. Dec. 516; *Montesquieu v. Heil*, 23 Id. 471; see also *Warder v. Arell*, 1 Id. 488; and *Saul v. His Creditors*, 16 Id. 212. The principal case is cited as an example of the manner in which statutes should be construed, in *Cullerton v. Mead*, 22 Cal. 98, and *Cormerais v. Genella*, Id. 126.

STATUTES AUTHORIZING VACATION AND SETTING ASIDE OF JUDGMENTS BY DEFAULT.—In a number of states statutes have been passed for the purpose of relieving a defendant under certain circumstances from the effects of a judgment or decree obtained against him by default. In New York, North Carolina, and Wisconsin these statutes provide that the court may "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect:" Rev. Stat. of Wis., c. 125, sec. 38; Code of New York, sec. 174; C. C. P. of N. C., sec. 133. The provisions of the California and Indiana statutes were formerly identical with the above, except that the proceeding to set aside the default should have been commenced within one year from the rendition of the judgment: C. C. P. of Ind., sec. 99; C. C. P. of Cal., sec. 473 (sec. 68 old Practice Act). But the California law was amended in March, 1880, and now provides that application for relief must be made within a reasonable time, "but in no case exceeding six months after such judgment, order, or proceeding was taken:" See C. C. P., sec. 473, as amended at that date.

The Indiana statute was also amended, but note the difference in the policy of the two legislatures. This statute as amended changed the discretionary power of the court to an absolute command, and extended the time within which to apply for relief to two years: Ind. Acts 1867, p. 100; *Smith v. Noe*, 30 Ind. 117; *Temple v. Irvine*, 34 Id. 412.

The Ohio and Iowa statutes provide that after the term at which a final judgment has been rendered, the court shall have power to vacate or modify such judgment. "For fraud practiced by the successful party in obtaining the judgment or order," or "for unavoidable casualty or misfortune preventing the party from prosecuting or defending:" Laws of Iowa, Rev. of 1860 sec. 3499; Rev. Stat. of Ohio, 1880, sec. 5354. In Vermont the statute gives the county court the power to hear, try, and determine a case in which final judgment has been rendered by a justice of the peace, by default, and where the defendant has been unjustly deprived of his day in court by fraud, accident, or mistake, or when the party has been prevented from taking an appeal from the same cause: Rev. Stat. of Vt. of 1863, p. 334; see also sec. 68, Practice Act of Nevada; Laws of Missouri, Rev. Stat. 1835, p. 460, sec. 31.

The provisions of these statutes do not apply to motions made during the term at which the judgment was entered: *McCulloch v. Doak*, 68 N. C. 267; nor do they preclude a party in a proper case from obtaining relief in equity after the time for applying for relief under these statutes has elapsed, provided proper reasons are shown for not making such application: *Freeman on Judgments*, sec. 105; *Dist. Town v. White*, 42 Iowa, 608; *Bond v. Epley*, 48 Id. 600; *Baker v. Riordan*, 3 West Coast Rep. (Cal.) 210. But these statutes do not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court; such relief must be confined to cases where the judgment was taken against a party through his "mistake, inadvertence, surprise, or excusable neglect:" *Loomis v. Rice*, 37 Wis. 262; *Spafford v. City of Janesville*, 15 Id. 477; *Ætna Ins. Co. v. McCormack*, 20 Id. 265; *Landon v. Burke*, 33 Id. 452; *Flanders v. Sherman*, 18 Id. 575; *Hartshorn v. The M. & St. P. R'y Co.*, 23 Id. 692; *Fornette v. Carmichael*, 38 Id. 236; *Van Dresar v. Coyle*, Id. 672. So after an appeal has been taken to the supreme court, the judge of the lower court has no power to set aside the judgment: *Isler v. Brown*, 69 N. C. 125. Nor do the provisions of the statutes here treated of apply to judgments of divorce: *Ewing v. Ewing*, 24 Ind. 468. As a general rule, laches will bar the applicant's claim for relief: *Jouet v. Mortimer*, 29 La. Ann. 206; *Williams v. Williams*, 70 N. C. 665; *Bradford v. Coit*, 77 Id. 72; but in Iowa the court laid down the rule that "laches will not be imputed in the exercise of a legal right within the time prescribed by the statute:" *The Ind. S. D. of R. R. v. Schreiner*, 46 Iowa, 172. The power of the court, for any of the statutory reasons, to relieve a party from a judgment taken against him must be exercised within the time provided in the statute, and not only must the motion be made but be brought to a hearing within that time: *Knox v. Clifford*, 41 Wis. 458; *Challoner v. Howard*, Id. 355; *Woolley v. Woolley*, 12 Ind. 663. But in Wisconsin, after the dismissal of the first motion without prejudice, a new motion was made after the expiration of the statutory period, and was allowed, as being in the nature of an amendment or continuance of the old motion: *Butler v. Mitchell*, 17 Wis. 52. See also *Howell v. Harrell*, 71 N. C. 161.

DISCRETION OF COURT.—The granting or refusing of an order vacating or setting aside a judgment by default rests, under these statutes, in the sound discretion of the court. The rule governing the exercise of this discretion, as laid down by Mr. Justice Sanderson, in *Bailey v. Taaffe*, 29 Cal. 422, is as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion to be exercised *ex gratia*, but a legal discretion to be exercised in conformity with the

spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present [an appeal from an order setting aside a judgment by default] as in any other." See also Freeman on Judgments, sec. 106; *Coleman v. Rankin*, 37 Cal. 247; *Leighton v. Wood*, 17 Abb. Pr. 177; *Johnson v. Eldred*, 13 Wis. 482; *Roland v. Kreyenhagen*, 18 Cal. 455; *How v. Independence Co.*, 29 Id. 72; *Haight v. Green*, 19 Id. 113; *Mullholland v. Heyneman*, Id. 605; *Hill v. Crump*, 24 Ind. 291; *Watson v. San Francisco etc.*, 41 Cal. 17; *Cooper v. Johnson*, 26 Ind. 247; *Seymour v. Board of Supervisors*, 40 Wis. 62; *Davis v. Reed*, 32 Vt. 785; *Carlisle v. Wilkinson*, 12 Ind. 91; *Hunter v. Elliott*, 27 Id. 93; *Blake v. Stewart*, 29 Id. 318. The power of the court, however, is to be liberally exercised: *Roland v. Kreyenhagen*, 18 Cal. 455; *Mason v. McNamara*, 57 Ill. 455; for "these statutes are remedial in their character, intended to furnish a simple, speedy, and efficient means of relief in a most worthy class of cases:" Freeman on Judgments, sec. 106. And the decree of the court in disposing of a motion to set aside a default will not be disturbed, except in case of gross abuse of the discretion of the court: See above cases; also *Carlisle v. Wilkinson*, 12 Ind. 91; *Griffith v. State*, Id. 548. But under the Indiana statute, as amended, when it is shown that the default was taken through the mistake, inadvertence, surprise, or excusable neglect of the party applying for relief, the court has no discretion, but must grant relief: *Bush v. Bush*, 46 Id. 70; *Cavanaugh v. T. W. & W. R. Co.*, 49 Id. 149.

APPEALS.—The finding by the judge of the lower court of the facts which are alleged to constitute surprise, mistake, or excusable neglect is conclusive, and can not be appealed from; but whether such facts, when found, constitute such surprise, etc., is a question of law, and from the decision of the judge upon it an appeal may be taken: *Griel v. Vernon*, 65 N. C. 76; *Powell v. Weith*, 68 Id. 342; *Brown v. Vernon*, 21 Vt. 68. In Wisconsin it is held that an order refusing to set aside a judgment by default is an order affecting a substantial right, and is appealable: *Johnson v. Eldred*, 13 Wis. 482; *Lery v. Goldberg*, 40 Id. 308; see also *Hill v. Crump*, 24 Ind. 291. So, also, an order vacating a judgment by default is appealable: *Bailey v. Taafe*, 29 Cal. 422; *Ætna Life Ins. Co. v. McCormack*, 20 Wis. 265. But in Indiana, upon an appeal from an order vacating a judgment, the court says: "The appeal to this court is premature. The order of the court setting aside the default and judgment is not a 'final judgment,' from which an appeal lies to this court. The question involved being saved by a proper exception, when the case shall be finally disposed of, all the points thus saved come up together:" *Spaulding v. Thompson*, 12 Ind. 477.

AFFIDAVIT OF MERITS.—"These statutes are to be employed only in furtherance of justice, and never for the purpose of enabling a party to raise some technical objection. Even when the statute does not so expressly direct, no judgment will be opened unless it is shown to be unjust. 'Every consideration of expediency and justice is opposed to opening up cases in which judgment by default has been entered, unless it be made to appear *prima*

facie that the judgment as it stands is unjust:' *Parrott v. Den*, 34 Cal. 79; *Thatcher v. Haun*, 12 Iowa, 303; *Wooster Coal Co. v. Nelson*, 4 U. C. Pr. Rep. 343; *Mulholland v. Scoggin*, 8 Neb. 202; *Anderson v. Beebe*, 22 Kan. 768; *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 162; *Bank of Statesville v. Foot*, 77 N. C. 131;" Freeman on Judgments, sec. 108. In Indiana the affidavit must set out the matters of defense upon which the applicant will rely. The nature of the defense must be shown; it is not sufficient to aver a belief in a meritorious defense: *Goldberry v. Carter*, 28 Ind. 59; *Frost v. Dodge*, 15 Id. 139; see also Indiana cases cited below. In California, however, and perhaps other states, a different rule prevails, and an affidavit stating that the case has been fully and fairly stated to counsel, who has advised affiant that he has a good, full, and perfect defense on the merits, is sufficient without stating the facts constituting the defense: *Woodward v. Backus*, 20 Cal. 137; see other California cases cited below. But whatever rule prevails in the different states with regard to the necessity of setting out the matters constituting the defense, all the cases unite in requiring that the affidavit should show that the default occurred through "surprise, mistake, inadvertence, or excusable neglect," and state the facts constituting such surprise, etc. Upon this point, and as to the general requirements of the affidavit of merits, see *Lake v. Jones*, 49 Ind. 297; *Buck v. Havens*, 40 Id. 221; *Phelps v. Osgood*, 34 Id. 150; *Nord v. Marty*, 56 Id. 531; *Hays v. Bank of State*, 21 Id. 154; *Bass v. Smith*, 60 Id. 40; *T. W. & W. R. Co. v. Gates*, 32 Id. 238; *Jelly v. Gaff*, 56 Id. 331; *Sturgis v. Fay*, 16 Id. 429; *Stevens v. Helm*, 15 Id. 183; *Nutting v. Losance*, 27 Id. 37; *Goldberry v. Carter*, 28 Id. 59; *Frost v. Dodge*, 15 Id. 139; *Yancy v. Teter*, 39 Id. 305; *Butler v. Mitchell*, 15 Wis. 355; *Pinger v. Van Click*, 36 Id. 141; *Bonnell v. Gray*, Id. 574; *Seymour v. Board of Supervisors*, 40 Id. 62; *Stilson v. Rankin*, 40 Id. 527; *Bailey v. Taaffe*, 29 Cal. 422; *Parrott v. Den*, 34 Id. 79; *Lamb v. Nelson*, 34 Mo. 501; *Foster v. Martin*, 20 Tex. 118; *People v. Rains*, 23 Cal. 127; *Mowry v. Hill*, 11 Wis. 146; *Town of Ormo v. Ward*, 19 Id. 232; *Burnham v. Smith*, 11 Id. 258; *McKinley v. Tuttle*, 34 Cal. 235; *Cook v. Phillips*, 18 Tex. 31; *Butler v. Mitchell*, 15 Wis. 355; *Van Horne v. Montgomery*, 5 How. Pr. 238; *Dix v. Palmer*, Id. 233; *Ellis v. Jones*, 6 Id. 296; *Grabb v. Crane*, 5 Ill. 153; *Palmer v. Russell*, 34 Mo. 476; *Hunt v. Wallis*, 6 Paige, 371; *Stockton v. Williams*, Harr. (Mich.) 241; *McGaffigan v. Jenkins*, 1 Barb. 31; *Reidy v. Scott*, 53 Cal. 69; *Harlan v. Smith*, 6 Cal. 173; *People v. O'Connell*, 23 Id. 281; *Seale v. McLaughlin*, 28 Id. 669; *Green v. Goodloe*, 7 Mo. 25; *Dunn v. Keegin*, 4 Ill. 292; *Richardson v. Finney*, 6 Dana, 319; *Sheldon v. Campbell*, 5 Hill, 508; *Pike v. Power*, 1 How. Pr. 53; *Watson v. Newsham*, 17 Tex. 437; *McKinstry v. Edwards*, 2 Johns. Cas. 113; *Spencer v. Webb*, 1 Cai. 118; *Cogswell v. Vanderbergh*, Id. 156; *Campbell v. Garton*, 29 Mo. 343; *Adams v. Hickman*, 43 Id. 168; *Quinn v. Case*, 2 Hilt. 467; *Stewart v. McMartin*, 2 How. Pr. 38; *Bogardus v. Doty*, Id. 75; *Reese v. Mahoney*, 21 Cal. 305; *Miller v. Alexander*, Coxe, 400; *Stephens v. Helm*, 15 Ind. 183; *Robinson v. Sinclair*, 1 How. Pr. 106; *Alberti v. Peck*, 1 Id. 230; *Draper v. Bishop*, 4 R. I. 469. As will be seen from an examination of the above cases, the formal affidavit of merits, if it does not set forth the facts constituting the defense, must state that the defendant has fully and fairly stated the case to his counsel, and that after such statement, he is advised by his counsel and believes that he has a good, full, and perfect defense to the action upon the merits. See also Freeman on Judgments, sec. 108. An affidavit which avers that the defendant has "stated his defense" to counsel, etc., is insufficient. It should aver that he had "stated the case:" *Burnham v. Smith*, 11 Wis. 258. For the same rea

son, to wit, that matters stated by defendant as constituting his defense might be true, and might seem to constitute a sufficient defense to the action, yet they might be affected by other matters in avoidance well known to defendant, but which he was under no obligation to state, a verified answer has been held not to obviate the necessity for an affidavit of merits: *Mowry v. Hill*, 11 Wis. 146; *Jones v. Russell*, 3 How. Pr. 324. But it seems that this rule has been changed by statute in Wisconsin: *Town of Ormo v. Ward*, 19 Wis. 232. So an affidavit is defective which states that defendant has stated "his case in this cause" to his counsel, instead of "the case." Such a statement is not equivalent to the averment that "he has stated his case" generally: *Ellis v. Jones*, 6 How. Pr. 296. An affidavit of an attorney which states that from an examination of defendant's case, so far as he has made such examination, he verily believes that it is better than plaintiff's is not sufficient. It is defective in not stating whether he knew anything about plaintiff's case, or whether his examination of the defendant's was elaborate or meager: *Bailey v. Taaffe*, 29 Cal. 422. If the affidavit is made by any other person than the party himself, it must show why it is so made, and the facts constituting the meritorious defense must be within the knowledge of affiant, and he must so state in his affidavit, as a statement that the principal party has fully and fairly stated his case to affiant would amount to but hearsay, and be entitled to no weight: *Bailey v. Taaffe*, *supra*; *Hunt v. Wallis*, 6 Paige, 371. The affidavit must also show that a default has been entered: *Pike v. Power*, 1 How. Pr. 53. It also appears to be the better practice to exhibit to the court the proposed answer at the time the motion is made. "We do not mean, however, to say that this latter step is absolutely necessary under our system. We design merely to suggest that such is the better practice, and is in accordance with the practice in courts of equity under the old system:" *Bailey v. Taaffe*, *supra*, per Justice Sanderson; *Thatcher v. Haun*, 12 Iowa, 308; *Stockton v. Williams*, Harr. (Mich.) 241; *Dunn v. Keegin*, 4 Ill. 292; *Levy v. Goldberg*, 40 Wis. 308.

CONTRADICTING AFFIDAVIT OF MERITS.—As we have seen above, the affidavits of merits consists of—1. A statement in substance that the party has a meritorious defense; in some states the matters constituting the defense must be stated; but for the purpose of contradiction by evidence this is immaterial; and 2. The facts upon which the applicant relies, as constituting the "surprise, mistake, inadvertence, or excusable neglect," from the effects of which he seeks to be relieved, and which we have seen must always be set forth in full. Affidavits or other evidence are never received for the purpose of contradicting the first averment. Such an action would amount to a trial of the action upon the merits, which is erroneous, as in a proper case the defendant is entitled to have these facts passed upon by a jury: *Freeman on Judgments*, sec. 109; *Hill v. Crump*, 24 Ind. 291; *Lake v. Jones*, 49 Id. 297; *Buck v. Havens*, 40 Id. 221; *Nord v. Marty*, 56 Id. 531; *Catlin v. Latson*, 4 Abb. Pr. 248; *Gracier v. Weir*, 45 Cal. 53; *Hill v. La Crosse & M. R. R. Co.*, 11 Wis. 214; *Bank v. Harrison*, 4 U. C. Pr. Rep. 331; *Wooster Coal Co. v. Nelson*, Id. 343; but the truth of the facts alleged in the second subdivision as illustrated above, to constitute the "surprise, mistake, inadvertence, or excusable neglect," may be established by any competent evidence, and for this purpose the party may even contradict the record: *Freeman on Judgments*, sec. 109; *Mosceaux v. Brigham*, 19 Vt. 457; *McKinley v. Tuttle*, 34 Cal. 235; *Lake v. Jones*, 49 Ind. 297; *Buck v. Havens*, 40 Id. 221.

NEGLECT OF ATTORNEY NO GROUND FOR RELIEF. "The neglect of the attorney or agent is uniformly treated as the neglect of the client, except in

New York:" Freeman on Judgments, sec. 112, citing *Austin v. Nelson*, 11 Mo. 192; *Kirby v. Chadwell*, 10 Id. 392; *Merritt v. Putnam*, 7 Minn. 493; *Jones v. Leech*, 46 Iowa, 186; *Gherke v. Jod*, 59 Mo. 522; *Matthis v. Town of Cameron*, 62 Id. 504; *Niagara Ins. Co. v. Rodecker*, 47 Iowa, 162; see also *Spaulding v. Thompson*, 12 Ind. 477; *Davidson v. Heffron*, 31 Vt. 687; *Griel v. Vernon*, 65 N. C. 76; *People v. Rains*, 23 Cal. 127; *Babcock v. Brown*, 25 Vt. 550; *Burke v. Stokely*, 65 N. C. 569. In *People v. Rains*, *supra*, the attorney had prepared a demurrer, but had failed to file it, having miscalculated the day when it was due; and in *Babcock v. Brown*, *supra*, the attorney forgot the time and day of the trial: in each case held insufficient to set aside the default. But in *Griel v. Vernon*, 65 N. C. 76, the failure of an attorney to file a plea, he having been employed to do so, was held by the court to constitute surprise, from which the court would grant relief. But in general, no mistake, inadvertence, or neglect, attributable to the attorney, can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client: *Spaulding v. Thompson*, 12 Ind. 477.

WHAT AMOUNTS TO "SURPRISE, MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLECT."—As to what constitutes such "surprise, mistake, inadvertence, or excusable neglect" as will entitle a party to relief under the statutes under discussion, see *Adams v. Citizens' State Bank*, 70 Ind. 89; *Harvey v. Wilson*, 44 Id. 231; *Barnes v. Smith*, 34 Id. 516; *Alvord v. Gere*, 10 Id. 385; *Bristor v. Galvin*, 62 Id. 352; *Nord v. Marty*, 56 Id. 531; *Hunter v. Francis*, Id. 460; *Luscomb v. Maloy*, 26 Iowa, 444; *Frasier v. Williams*, 18 Ind. 416; *Elston v. Schilling*, 7 Robt. 74; *Sharp v. Mayor of N. Y.*, 31 Barb. 578; *Watson v. San Francisco etc.*, 41 Cal. 17; *Deal v. Palmer*, 68 N. C. 215; *Biddleman v. Kewen*, 2 Cal. 250; *People v. Lafarge*, 3 Id. 134; *McKinley v. Tuttle*, 34 Id. 235; *Ratliff v. Baldwin*, 29 Ind. 16; *Butler v. Mitchell*, 17 Wis. 52; *Robertson v. Bergin*, 10 Id. 402; *Langdon v. Bulloch*, 8 Ind. 341; *Bertline v. Bauer*, 25 Wis. 486; *Johnson v. Eldred*, 13 Id. 482; *Hill v. Crump*, 24 Ind. 291; *Sage v. Matheney*, 14 Id. 369; *Montgomery v. Ellis*, 6 How. Pr. 326; *Stafford v. McMillan*, 25 Wis. 566; *Greer v. Mayor of New York*, 4 Robt. 675; *Pettigrew v. Mayor of N. Y.*, 17 How. Pr. 492; *Levy v. Joyce*, 1 Bosw. 622; *Independent School District v. Schriener*, 46 Iowa, 172; *Laithe v. McDonald*, 12 Kan. 340. As an illustration of the cases which have been held within the statute, see *Ratliff v. Baldwin*, 29 Ind. 16, where the party and his attorney were in court until informed by the judge that the case would not be tried at that term, whereupon they departed. Subsequently a judge *pro tem.* allowed a default; held, that it should be set aside. In *Bristor v. Galvin*, 62 Id. 352, it was shown that the applicant had with reasonable diligence employed an attorney to defend him, but that the attorney by reason of sickness had been unable to do so. The court held that the inadvertence of the attorney should be regarded as the inadvertence of the client, and that he was entitled to relief. In *Nord v. Marty*, 56 Id. 531, the applicant, who was a German with a very imperfect knowledge of the English language, and with very little business knowledge or knowledge of legal proceedings, was relieved upon the ground of "excusable neglect," upon showing that when he went to employ counsel to defend his suit he was met by plaintiff, who talked with him about compromise, told him "the case was continued," and told him to go home and they would try and compromise. Plaintiff's counsel also talked with him about a compromise. He thus failed to employ counsel and was defaulted. The defendant in *Hunter v. Francis*, Id. 460, had from time to time made payments upon a note which his sister held against him. He took no receipts therefor, as perfect confidence existed be-

tween them. The sister afterwards brought suit upon this note, and defendant residing in another county, being short of funds, and believing his sister would give him proper credits upon the note, failed to attend court and was defaulted. The sister, however, giving him no credits upon the note, took judgment for the full amount, and upon showing these facts it was held he was entitled to relief. So the mistake of defendants in concluding that the judgment would not be entered against them personally, but only against them as trustees, that being the only capacity in which they were liable, justifies the court in vacating a judgment against them individually: *Butler v. Mitchell*, 17 Wis. 52. A mutual and honest mistake between an attorney and his client with relation to the attorney's retainer, whereby the client was not represented at the trial, is a sufficient cause for vacating the judgment: *McKinley v. Tuttle*, 34 Cal. 235.

WHAT DOES NOT CONSTITUTE "SURPRISE, MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLIGENCE."—A party is not entitled to relief for any of the above causes when he has simply written to an attorney to appear in a cause for him, and the attorney fails to do so: *Burke v. Stokely*, 65 N. C. 569; nor is a party entitled to relief upon the ground of "excusable neglect" where he staid away from court because he knew nothing about the action personally, and expected a witness whom he had duly summoned would attend, but who failed to do so: *Waddell v. Wood*, 64 Id. 624. The fact that the preparation of the answer required more than ordinary time, and during a portion of the time limited the attorney was absent from home, is not such excusable negligence as would justify the setting aside of a default: *Bailey v. Taaffe*, 29 Cal. 422; so an affidavit by defendant that he was under the impression when he retained counsel that his time to answer had not expired, that he was ill at the time the summons and complaint were served upon him, and did not recollect the precise day, is insufficient: *Elliott v. Shaw*, 16 Cal. 377; a mistake as to the court in which an action is pending is no excuse: *Robertson v. Bergin*, 10 Ind. 402; nor is the loss of a note constituting a defense an "unavoidable casualty or misfortune," within the meaning of the Iowa statute: *Miller v. Albaugh*, 24 Iowa, 128; so where the defendant's attorney forgot the day of the trial, it was held insufficient: *Babcock v. Brown*, 25 Vt. 550. For further cases setting forth facts which do not come within the statutes, see *Thatcher v. Haun*, 12 Iowa, 308; *Grootemaat v. Tebel*, 39 Wis. 576; *Stilson v. Rankin*, 40 Id. 527; *Clegg v. N. Y. White S. S. Co.*, 67 N. C. 302; *Harper v. Mallory*, 4 Nev. 448; *Chase v. Swain*, 9 Cal. 130; *Hays v. Bank*, 21 Ind. 154; *Haight v. Green*, 19 Cal. 113; *Seale v. McLaughlin*, 28 Id. 669; *Burke v. Stokely*, 65 N. C. 569.

PEOPLE EX REL. SMITH v. OLDS.

[8 CALIFORNIA, 167.]

MANDAMUS LIES ONLY TO PREVENT FAILURE OF JUSTICE, and where there is not a specific remedy in the ordinary course of law; and there should be not only a lack of a specific legal remedy, but there should be a specific legal right.

SECTION 468 OF PRACTICE ACT is but a reaffirmance of the common law. It provides that the writ of *mandamus* "shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the

ordinary course of law." It shall issue in no other cases than those therein provided for.

TITLE TO OFFICE IN POSSESSION OF ANOTHER, exercising the duties as officer *de facto*, can not be tried upon *mandamus*. Further, the writ will not lie in this case, as the statute provides a plain, speedy, and adequate remedy.

MANDAMUS CAN GIVE NO RIGHT, not even the right of possession, although it may enforce one.

QUO WARRANTO IS PROPER REMEDY TO TRY TITLE TO OFFICE.

MANDAMUS DOES NOT LIE TO ADMIT ONE PERSON INTO OFFICE which is already filled by another as officer *de facto*.

DISTINCTION BETWEEN MANDAMUS AND QUO WARRANTO exists as much under our statute as at common law.

APPEAL from the fourth judicial district. The opinion states the necessary facts.

Bates and Gorham, for the relator.

Cooke, for the defendant.

By Court, WELLS, J. This is an application for an alternative *mandamus* to the defendant, to compel him to hand over to the relator the books and papers of the office of the clerk of the superior court of the city of San Francisco, and to allow him to enter upon the discharge of said office, to which he claims to have been elected.

To the general allegations contained in the application of the relator, the defendant filed a general demurrer, on the ground that the relator should have sought his remedy against the defendant by an action upon information in the nature of a *quo warranto*, and not by a writ of *mandamus*; and also a general answer denying the facts on which the election is claimed; to which the relator has demurred and also replied.

The court below sustained the demurrer and dismissed the petition, on the ground that the proceeding by *mandamus* was not the proper remedy, and we are asked on appeal to reverse this decision.

It is contended, on the part of the appellant, that the writ of *mandamus* is the proper remedy both at common law and under the statute of this state; that the statute is explicit, and gives this remedy in precisely such a case as this.

At common law, the proceeding by *mandamus* was employed as a supplemental and extraordinary writ of a remedial character, and was resorted to early in the annals of English jurisprudence, from the necessity of establishing a residuary method to be used on occasions where the law had provided no other remedy, and

where in justice there ought to be one, upon the principle that no right should be without a remedy. According to Lord Mansfield, "if there be a right and no other specified remedy, it will not be denied; in fact, where there is a right to execute an office, perform a service, or exercise a franchise, more especially if it be a matter of public concern, or attended with profit, and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, the court will interpose by *mandamus*:" *Rex v. Barker*, 3 Burr. 1266, 1267. By means of this supplementary remedy, also, inferior officers and tribunals are forced to perform their duties. Blackstone describes this writ as, in general, a command issuing in the name of the sovereign authority from a superior court, and directed to any person, corporation, or inferior court of jurisdiction within the jurisdiction of such superior court, requiring them to do some particular thing therein specified, which appertains to their office and duty.

But all the authorities agree that it lies only to prevent a failure of justice, and where there is not a specific remedy in the ordinary course of law. To authorize its use, there should not only be a want of specific legal remedy, but also there should be a specific legal right. See case of *Fish v. Weatherwax*, 2 Johns. Cas. 217, note sec. 6; and the right must be perfect, not inchoate: *People v. Trustees of City of Brooklyn*, 1 Wend. 318 [19 Am. Dec. 502]. It is a rule of general application that where there is any other specific legal remedy for the party complaining, the writ of *mandamus* will not lie. But where there is no other adequate specific remedy, resort may be had to this high judicial writ: *Per Morton, J., in Strong, Petitioner*, 20 Pick. 495. In *People v. Stevens*, 5 Hill, 626, a case similar in many respects to the present, being a proceeding where the relator claimed to be the clerk of the city of Brooklyn, and sought by this writ to be put in possession of the books and papers belonging to the office, while the defendant was actually in the possession of the office under color of lawful right to hold it. Bronson, J., in delivering the opinion of the court, remarks, that "where the party has another specific remedy, a *mandamus* will not be granted. This," he says, "has been decided a hundred times, and the rule is so well settled that it would be a waste of time and paper to cite the books. Many of the cases are collected in Angell & Ames on Corp., 2d ed., 577, 578." And Judge Cowen, without passing upon the other questions, concurred in giving judgment for the defendant on the express

ground "that the relator, if he was clerk, had another specific legal remedy for obtaining the books and papers." It is still insisted that many authorities are the other way, and according to Mr. Dane, 6 Dane's Abr. 326, the authorities, both English and American, are much in favor of *mandamus*, especially the more modern cases; and prominent among the cases cited, and upon which the relator most confidently relies, is that of *Dew v. The Judges of Sweet Springs etc.*, 3 Hen. & M. 1 [3 Am. Dec. 639]. We have carefully examined all the authorities cited by the appellants upon this subject within our reach, and have found that in no case where the writ of *mandamus* has been suffered to go, has it appeared that there was any other more speedy or adequate remedy.

In the Virginia case, as Judge Bronson properly suggests, *People v. Stevens, supra*, it did not appear that the relator had any other adequate remedy, and indeed, the decision rested upon the ground that there was no other remedy so well adapted to the nature of that case; and generally, where the authorities are claimed to be in favor of *mandamus*, it will be found that they arise when *quo warranto* is not regarded as affording a specific remedy; and indeed, it may be said that all the exceptions to the general rule depend upon an absence of another specific, adequate, or speedy legal remedy, or arise from the nature of the remedy which is to exclude the application of the writ; as, for example, where such remedy is incompetent to afford relief to the applicant upon the very subject-matter of his application. Therefore, it has been said that if the party have another speedy, specific legal remedy, yet if it be obsolete, as in assize, this writ will lie; so, also, if such remedy be extremely tedious (as it sometimes occurs where it is by *quo warranto*), it will lie, since in such cases the remedy is inadequate to do justice: *People v. Mayor of N. Y.*, 10 Wend. 396, *per* Nelson, J. And it is said that *mandamus* is the proper process for restoring a person to an office from which he has been unjustly removed; but that is where, for example, a person has been removed from an office by a corporation without authority, or where a court has unlawfully removed a clerk; for in such case there is no other specific remedy, and it is used to compel the corporation or court to do right, and to restore the party to an office from which he has thus been removed. Such was the purpose for which it was resorted to in the Virginia case; it was to restore the relator to an office he had once exercised and enjoyed, to which his title was clear, and of which he had been unlawfully

deprived by the judges. In *Strong, Petitioner*, 20 Pick. 495, cited by the appellant, the relator asked for a *mandamus* to compel the board of examiners to give him a certificate of election, and it was granted, upon the ground that no other remedy would reach the evil; but it was expressly stated by the court that it would not have been granted had there been any other adequate specific remedy.

Judge Nelson, whose dissenting opinion in *People v. Stevens*, *supra*, is relied upon by the appellants, has repeatedly maintained this doctrine: See *People v. Mayor of New York*, 10 Wend. 395. He says: "The proposition is, I believe, universally true that the writ of *mandamus* will not lie in any case where another legal remedy exists, and it is used only to prevent a failure of justice." He further observes: "The principle which seems to lie at the foundation of applications for this writ and the use of it is, that whenever a legal right exists, the party is entitled to a legal remedy, and when all others fail, the aid of this may be invoked." And he cites as authority upon this point *Rex v. Barker*, 3 Burr. 1267; *Rex v. Bishop of Chester*, 1 T. R. 404; *Rex v. Stafford*, 3 Id. 651; *Rex v. Windham*, Cowp. 378, *per* Buller, J.; 4 Bac. Abr., tit. *Mandamus*, 496; *People v. Albany*, 12 Johns. 415; *Hull v. Supervisors of Oneida*, 19 Id. 259 [10 Am. Dec. 223]; *Ex parte Nelson*, 1 Cow. 419. Again, in *People v. Mayor of New York*, 25 Wend. 685, Nelson, then chief justice, says: "After full consideration, I feel persuaded that the relator has a perfect legal remedy by action, which upon settled principles forbids a resort to the writ of *mandamus*."

Indeed, all the cases cited by the appellants, and which it is claimed overrule this position, will be found to depend upon the ground that no other remedy is adequate, specific, or proper; and the conclusion at which we have arrived is, that the established rule of the common law upon this subject stands unshaken and unimpaired by any of the modern cases. But if any doubt can remain upon this question, or if the mere weight of authority, either as regards the number of authorities or the respectability of their source, is against the proposition, the statutes of this state unquestionably settle the point beyond all further controversy.

The statute which we regard as an embodiment and reaffirmance of this view of the principle of the common law provides that "this writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of

law:" Practice Act, sec. 468. And *e converso*, it shall issue in no other. The ground assumed by the appellants is, that although another remedy, plain, adequate, and speedy, in the ordinary course of law, does exist, still resort may be had to this writ. We can not admit that such was the intention of the legislature in framing this enactment, but conceive that it was intended to give statutory authority and validity to a process which is regarded as a remedy of an extraordinary and supplemental character, and to define its functions and limit its power in accordance with the recognized and established principles of the common law; and viewed in this light, it is in perfect harmony and consonance with those principles.

But there is another reason why *mandamus* should not be resorted to in a case like the present; and as this appeal has been urged with much earnestness, we propose to review this question in all its bearings, believing that public policy and public security can best be subserved by a final disposition of this matter, and in order not only that the questions involved in this instance shall be fully considered, but that fruitless litigation may hereafter be avoided in similar cases.

This is professedly a proceeding under the statute of this state to compel the admission of the relator to the use and enjoyment of an office to which he is entitled, and from which he is unlawfully precluded, but in reality it is a proceeding to try the title to the office; both parties claiming it, and the defendant, who has been admitted and sworn, being in possession, and contending that he is the lawful incumbent. The relator demands the writ of *mandamus* to compel the defendant to hand over to him the books and papers, and to allow him to enter upon the discharge of the duties of the office, upon the ground that he is entitled to it, and that he is unlawfully precluded from the enjoyment of it by the defendant.

In the first place, this can not be said without begging the question of title, and while the defendant is actually in possession of the office, duly sworn and admitted, and exercising the duties as officer *de facto*, he is *prima facie* entitled to it: such is the presumption of law; and in the second place, while the defendant is thus in the office, under the color of lawful right, and claiming to be the lawful incumbent, his title to the office can not be tried upon *mandamus*; and thirdly, the statute has provided a plain, speedy, and adequate remedy at law by the practice act, which provides for an action "against any person who usurps, intrudes into, or unlawfully holds or

exercises any public office, civil or military, or any franchise within the state."

We consider that it is a well-settled rule of the common law that the title to an office can not be tried by *mandamus*. A *mandamus* can give no right, not even the right of possession, although it may enforce one. It may be resorted to for the purpose of putting a claimant in a position to assert his right, when without that he could not do so. It may be used to compel an officer of an election to give a claimant a certificate of his election, but this, if he obtains it, will not necessarily oust the incumbent or give the claimant possession of the office. So, too, it will lie upon the application of a person showing a *prima facie* right to an office, who seeks to have the proper oath of office administered to him to the end that it may place him in a condition to assert his legal rights, but he would still have to resort to *quo warranto* to oust the incumbent and get possession of the office.

The authorities to sustain the position that *mandamus* will not lie when the office is full are very numerous, but we propose to cite only a few of them. The whole subject has been considered in the notes appended to the report of *Fish v. Weatherwax*, 2 Johns. Cas. 217, in which, among others, is cited the following: "Though a *mandamus* to admit to an office gives no title, yet it will not be granted when there is an officer *de facto*, though that officer be in under a temporary *mandamus* obtained by collusion and claim under the same election with the applicant; for the remedy is to try the title to the office *de facto*, or on information in the nature of a *quo warranto*:" Angell & Ames on Corp., 3d ed., 639.

"A *mandamus* to a mayor to admit one to the office of recorder was refused because there was a recorder *de facto*, and it was therefore a decisive answer to the application that there was another remedy, by an information in the nature of a *quo warranto*, by which the title of the officer in possession could be tried:" *Rex v. Mayor of Colchester*, 2 T. R. 259. So of one to a bishop to compel him to license a curate of an augmented curacy, where there was a cross-nomination; for the party had a specific legal remedy by *quare impedit*: *Rex v. Bishop of Chester*, 1 Id. 396. "If *quare impedit* does lie, *mandamus* does not:" *Per* Lord Mansfield, in *Powel v. Milbank*, Id. 399, note.

But though an office be full, still if *quo warranto* does not lie, a *mandamus* will be granted, upon the principle that the party shall not be without a remedy: *Rex v. Mayor of Colchester*, *infra*.

The American authorities also support this position. The case of *People v. Mayor of N. Y.*, 3 Johns. Cas. 79, is directly in point. The court there say that "where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a *mandamus* is never issued to admit another person. The proper remedy in the first instance is by an information in the nature of a *quo warranto*, by which the rights of the parties may be tried." His authority is amply sustained by others. It is commented upon by Justice Morton in *Strong, Petitioner*, 20 Pick. 495; but he does not rule against it, the case being decided upon another point; he however concurs with Mr. Dane, and refers to the Virginia case; but we have already sufficiently considered that authority. In *People v. Stevens*, 5 Hill, 626, Bronson, J. says, after stating the facts of the case: "Enough has been stated to show that the relator proposes upon this writ of *mandamus* for the delivery of papers to try the title to the office of clerk. The relator has several difficulties to encounter which I think insuperable; and in the first place, the defendant is actually in the office of clerk, under color of lawful right to hold it. A writ of *mandamus* is not the proper mode of trying it. The relator should have proceeded by an information in the nature of a *quo warranto*. In *The King v. Corporation of Bedford*, 6 East, 357, a *mandamus* was granted; but it was for the reason that a *quo warranto* would not lie in that particular case, and there was no other adequate remedy. The relator should first establish his right to the office by a direct proceeding for that purpose, and then his right to the books and papers would follow as a matter of course."

There are other cases to show that though an office be full, still if *quo warranto* does not lie, a *mandamus* will be granted; but this is upon the principle that the party shall not be without a remedy.

In the present case, it can not be said that the relator is without a remedy. The statute is ample, and furnishes not only a specific, but adequate and speedy remedy. It was the intention of the propounders of the law that it should be so, and we have not yet discovered that the remedy is deficient in any respect. Until it shall appear that the relator is without a plain, speedy, and adequate remedy in the ordinary course of law, we must conclude that the *mandamus* was not proper in the premises, or appropriate to the relief sought. We can not accede to the proposition that the distinction between the two writs in force in England, and which are said to have originated under the

statutes of Anne and George I., have been abolished by our statute; the very reverse of this is the fact, for not only is the distinction recognized, but if it had never existed at common law, it might truly be said to have been created by the language of our statute; and conceding that the decision in the Virginia case, the dissenting opinion of Chief Justice Nelson in *People v. Stevens, supra*, and the ruling of the supreme court of Massachusetts in *Strong, Petitioner, supra*, shall be considered as sound law, yet they do not conflict with our interpretation of the statute of this state, which, as we have already said, provides an ample, speedy, and adequate remedy; especially so since the construction put upon it by this court in *People v. Fitch*, 1 Cal. 519.

It is finally urged that, as the defense is technical, and does not address itself to the merits of the case, or the conscience and equity of the court, the statute regulating the issuance of a *mandamus* ought to receive a liberal interpretation. In reply to this, we have but to say that the appeal is not brought upon the ground that equitable relief had been sought and denied, but from a decision which it is asserted was erroneous in law, and we sit here to review the decision on questions of law alone, and to decide what the law is, to give a correct interpretation of the statute under which the relator has, by his own choice and selection, proceeded.

For the purpose of affording relief to him, we are asked by this appeal, in effect if not in terms, to proceed upon the maxim, *Boni judices est ampliare jurisdictionem*, as the learned judges in the Virginia case seem to have done, relying upon the peculiar character and circumstances of the case before them for their justification; but, with all due deference be it said, we can not see how we can follow their example and conform to this maxim in the present case, without a usurpation that would necessarily destroy alike the reason and justice of the maxim; for how can we amplify the remedy by *mandamus* which is limited by statute without assuming jurisdiction? The hardship of a particular case or the difficulties which surround it can not be urged in justification of an innovation upon the settled rules of law, or the principle of correct interpretation established by the experience and confirmed by the approbation of ages. We have no right, even if we had the inclination, to sweep away the established rules of law, or to enlarge the remedy provided and limited by the language of the statute, for the purpose of relieving the relator by what is termed a "liberal interpretation;"

to do so would be to overstep the bounds of certainty, and wander forth in every case in pursuit of some new light to guide us in the path of justice.

After full and careful examination of this case, we are satisfied that the decision of the court below was correct, and therefore order that it be affirmed.

HEYDENFELDT, J., concurred.

TO ENTITLE PARTY TO WRIT OF MANDAMUS he must show that he has a specific legal right, and no other adequate legal remedy: *Ex parte Trapnall*, 42 Am. Dec. 676; *Board of Police v. Grant*, 47 Id. 102, and note; *Moody v. Fleming*, 48 Id. 210, and note; *Reading v. Commonwealth*, 51 Id. 534, and note; *Arberry v. Beavers*, 55 Id. 791, and note. *Mandamus* is never issued when a person is in an office by color of right, to admit another. The proper remedy is an information in the nature of a *quo warranto*: *St. Louis County Court v. Sparks*, 45 Id. 355, and note. *Mandamus* is not the proper remedy to try title to an office: See extensive discussion of this subject in note to *State v. Dunn*, 12 Id. 28. The principal case is cited in *Merced Mining Co. v. Fremont*, 7 Cal. 131, to sustain a decision that *mandamus* will lie to compel a district judge to issue an attachment, the remedy by appeal being inadequate; and in *Satterlee v. San Francisco*, 23 Id. 314, to the point that *quo warranto* is the proper proceeding in which to try title to an office.

WILSON v. CUNNINGHAM.

[3 CALIFORNIA, 241.]

EXTRAORDINARY CARE IS REQUIRED of a person or corporation who operates in the thronged thoroughfares of a city, for his own benefit, cars run by machinery, or who exercises in such thoroughfares any business which involves constant risk and danger.

ACTION to recover damages for injuries to plaintiff and his horse, wagon, and goods, caused by collision with certain cars of the defendants, run by machinery upon a railroad along Battery and across Bush street, in San Francisco. The right of the defendants to run the cars was not questioned. The judge charged the jury, among other things, "that the degree of care required of the defendants was in proportion to the danger incident to the business they were engaged in; that the running of cars in the highway, being an extraordinary way of using the public streets, and attended with extraordinary danger to passengers, the defendants were bound to use the utmost care to prevent injury to passengers; and it was for the jury to determine from the evidence whether the defendants had used all proper care, in view of the extraordinary nature of the business, and the extraordinary danger incident to it." Verdict and

judgment for plaintiff. Defendant moved for new trial, and appealed.

Halleck, Peachy, and Billings, for the appellants.

Lockwood, for the respondent.

By Court, HEYDENFELDT, J. In the case of railroads which are permanently established by law as a mode of conveyance, the rule is correctly stated by the respondent's counsel, that the conductors are only required to use the ordinary care pertaining to that description of business. But no reason exists for extending such a rule to the present case. Where the streets of a city, forming, as usual, thronged thoroughfares, are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, and for the pursuit of a business which involves constant risk and danger, no other rule is consistent with the safety and protection of the community than that which demands extraordinary care.

Judgment affirmed.

WELLS, J., concurred.

EDDY v. SIMPSON.

[3 CALIFORNIA, 249.]

PROPERTY IN WATER IS USUFRUCTUARY, and consists not so much in the ownership of the fluid itself as the advantage of its use.

PARTY OVER WHOSE LAND STREAM FLOWS has a right to its reasonable use during its passage. The right is not in the *corpus* of the water, and only continues with its possession; nor can a party reclaim water that he has lost.

RIPARIAN RIGHTS.—Plaintiff established a dam and acquired a water right upon a certain stream. Defendant did likewise upon another stream. After defendant had used the water at his dam it found its way by natural courses into plaintiff's stream above his said dam. Defendant afterwards erected a dam above plaintiff's, and interfered with his flow of water, claiming the right to withdraw from said stream as much water as flows into it from his first-mentioned stream. *Held*, that when the water left defendant's dam he lost all right to and interest in it, and when it joined the stream in possession of plaintiff, plaintiff became entitled thereto, and defendant could not withdraw it.

APPEAL from the tenth judicial district. The facts are very clearly stated in the opinion of the court. The court below instructed the jury, among other things, that "if the defendants, by means of their ditch from Grizzly canyon and Bloody run,

conveyed into Shady creek as much water as they afterwards took from it by their second ditch, then plaintiffs can not be damaged."

Rowe and Dun, for the respondents.

By Court, WELLS, J. From the record in this case, it appears that the plaintiffs constructed a dam across a stream called Shady creek to French corral, where the water was used by plaintiffs for mining purposes.

After the construction of plaintiffs' work, and plaintiffs had been for a considerable time in possession of and using the waters of Shady creek, the defendants constructed a work of a similar nature, whereby they brought water from Grizzly canyon and Bloody run to a place known as Cherokee corral, where the water from defendants' ditch was used for mining purposes. The water thus used by defendants at Cherokee corral from that point found its way, by natural channels and by the natural level of the country, into the waters of Shady creek, above the dam of plaintiffs.

The defendants subsequently constructed a dam above the plaintiffs' dam, run a ditch to French corral, and diverted a portion of the waters of Shady creek, so that at times no water descended to plaintiffs' works, the entire quantity being used by defendants' ditch above.

The point made by the defense on the trial of the cause below was, that by the act of the defendants the waters of Grizzly canyon and Bloody run were caused to flow into Shady creek; that therefore the defendants had a right to construct a dam and ditch above plaintiffs, and carry off the same quantity of water from Shady creek that flowed from defendants' ditch at Cherokee corral.

This defense is set up substantially in the answer of defendants, and the court below held that defendants had an exclusive right to the water which they had caused to flow into Shady creek, and could withdraw the same. The instruction refused and the charge given by the court both assume this right in the defendants.

In considering the question presented, it is to be observed that the foundation of the plaintiffs' right was their first possession. Of all the waters running into Shady creek, they were in the possession and use until defendants constructed their ditch above them, running to French corral. There is no pretense of right in the defendants to carry off water from Shady

creek, except a claim of property in the water from Cherokee corral.

It is laid down by our law-writers that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use.

The owner of land through which a stream flows merely transmits the water over its surface, having the right to its reasonable use during its passage. The right is not in the *corpus* of the water, and only continues with its possession: Angell on Watercourses, 86. A party can not reclaim water that he has lost: 2 Bla. Com. 18. When the water of Grizzly canyon and Bloody run left the possession of the defendants at Cherokee corral, all right to and interest in that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady creek, joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them.

As defendants had lost all right in the water, they could have no right to withdraw it from the possession of the plaintiffs. The rule laid down by the court below, while it is a departure from all the rules governing this description of property, would be impracticable in its application, and we think it much safer to adhere to known principles and well-settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this state are embarked.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

HEYDENFELDT, J., concurred.

RIGHT OF EACH PROPRIETOR TO NATURAL AND UNINTERRUPTED FLOW OF STREAM, in the absence of any adverse right acquired, is well settled. See all the cases in this series upon this point collected in note to *Newhall v. Ireson*, 54 Am. Dec. 794.

NATURE AND EXTENT OF PROPERTY IN WATER is discussed at length in note to *Gardner v. Newburgh*, 7 Am. Dec. 531. In this note the proposition that a proprietor's interest is merely a simple usufruct is discussed and somewhat limited. In *Kelly v. Natoma Water Co.*, 6 Cal. 108, the principal case is cited to the point that possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows; and in the case of *N. C. & S. C. Co. v. Kidd*, 37 Id. 310, the court say that a water right is only acquired after actual appropriation, and when thus acquired, the property is not in the *corpus* of the water, but in its use, and cite the principal

case. It is also cited in *McDonald v. Askew*, 29 Id. 206, where the court say that an interest acquired by prior location is not an interest in the water as such, but a right to its use at the point of appropriation. It is also cited and distinguished in *Hoffman v. Stone*, 7 Id. 46, and *Butte C. & D. Co. v. Vaughn*, 11 Id. 151.

WILCOMBE v. DODGE.

[3 CALIFORNIA, 260.]

SUIT BROUGHT UPON PROMISSORY NOTE ON DAY IT FALLS DUE is premature, as the maker has all of that day in which to pay it.

APPEAL from the fifth judicial district. This is an action to recover the amount of a promissory note, dated March 15, 1852, payable in fifteen days. The record shows that the suit was commenced and summons issued before the expiration of the three days of grace allowed by law. The lower court ordered judgment for plaintiff, and defendant took this appeal.

Huntington, Martin, and Dwinelle, for the appellants.

Irving and Benham, for the respondents.

By Court, HEYDENFELDT, J. It is contended that suit may be brought on a promissory note on the day it becomes due, and several authorities have been cited which have so determined. We prefer adhering to the reasonable rule, which has been long established, that the payee has all of the day on which the note falls due in which to pay it, and therefore that a suit commenced on that day is premature. The cases which decide otherwise subvert the general principle of law for the seeming purpose of remedying particular cases of hardship.

We are satisfied that a departure from a reasonable and well-settled doctrine is productive of too much harm in the future to authorize us to adopt it, howsoever much it may be merited in a given case.

Judgment reversed.

MURRAY, C. J., concurred.

ACTION BROUGHT AGAINST MAKER OF NOTE on the third day of grace is prematurely brought: *Osborn v. Moncure*, 3 Wend. 170. The maker has the whole of the third day in which to make payment: Id.; see *Hartley v. Case*, 1 Car. & P. 555. But in *Shed v. Brett*, 1 Pick. 401, the court hold that an action brought on the day the note falls due, after the same has been dishonored, by the maker thereof failing to pay, and notice thereof having been sent to the indorsers, is not premature. See also *City Bank v. Cutter*, 3 Id. 414; *Boston Bank v. Hodges*, 9 Id. 420; *Crenshaw v. McKiernan*,

1 Minor, 173; *Greely v. Thurston*, 4 Greenl. 479; but if the action is brought upon the day the note falls due, before notice has been given to the indorser, it is premature, and it is an immaterial circumstance that the note had been put into the hands of a notary before the writ had been served by the sheriff, and that he notified the indorser the same day: *New England Bank v. Lewis*, 2 Pick. 125. The principal case is cited and explained in *McFarland v. Pico*, 8 Cal. 634. It is also cited in *Davis v. Eppinger*, 18 Id. 379, to sustain the decision that an action upon a promissory note payable one day after date, without grace, commenced upon the next day of the execution of the note was prematurely brought.

JOHNSON v. TOTTEN & KELLOGG.

[3 CALIFORNIA, 343.]

PARTNERSHIP HAS LIMITED EXISTENCE AFTER DISSOLUTION, for the purpose of fulfilling engagements made during its existence; consequently the late members of a firm, by selling butter consigned to the firm of which they were recently members after its dissolution, by one having no notice of such fact, become liable to the consignor as partners.

ACTUAL NOTICE OF DISSOLUTION OF PARTNERSHIP must be brought home to a party dealing with it in order to change the character of the partners' liability.

CREDIT SALE BY CONSIGNEE OF GOODS, with power to sell, but without authority to sell on credit, will be considered with regard to the rights of the consignor as having been for cash, and the consignee is liable to the consignor as for money had and received.

APPEAL from the fourth judicial district. This was an action for money had and received by defendants, as copartners, for the use of plaintiff. It appears that the defendants, under the firm name of Totten & Kellogg, had been commission merchants in the city of San Francisco. That plaintiff shipped to them at that place a consignment of butter, which arrived in April, 1852, the bill of lading to which was made out to defendants in their firm name. Totten & Kellogg dissolved partnership February 18, 1852, and a notice of such dissolution was published, and they endeavored to inform plaintiff of such dissolution by sending a letter to him, which left San Francisco March 1, 1852. Plaintiff left his home in New York before such letter could reach him; and owing to accidents occurring on the voyage, he did not arrive at San Francisco until May 17, 1852, until which time he could have had no notice of the dissolution of said partnership. After the dissolution of the partnership Kellogg employed Totten as a clerk in his store, and when the consignment of butter arrived, they agreed that they would sell it and divide the commission. They indorsed the bill of lading "Totten & Kellogg," took the goods, and proceeded to sell them. Defend-

ants' books showed that, among other sales, they had sold to Cheesboro & Bell some of said butter, but did not show that the amount had been collected nor the length of the credit given. Defendants proved that this sale was made upon credit, and for the purpose of showing that they had authority to give credit, produced some of plaintiff's letters, none of which in direct terms gave such power, but urged speedy sales, etc. Defendants claimed that they could not be charged with the proceeds of the sales without proof that the amount had been collected by them. The referee to whom the matter was referred found for plaintiff, and defendants appealed.

Hackett and Judah, for the appellants.

By Court, HEYDENFELDT, J. The respondent urges that two sales and receipts therefrom of money were made after the dissolution of the partnership, one by each partner, and that they were therefore not jointly liable. I am satisfied that notwithstanding the dissolution of the partnership, yet, for the purpose of fulfilling engagements made during its existence, it had a limited existence legally, and subsisted for such purpose, even after the act of dissolution by the parties: See Collyer on Part. 118.

Independent of this position, it is positively shown that the plaintiff had no notice of the dissolution, which was absolutely necessary in order to change the character of the defendants' liability. To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. It is true that notice may be implied from circumstances, but in this case it is shown positively that although the defendants took every necessary step to give the notice, yet it was impossible that the plaintiff could have received it.

Another objection is, that the amount of a sale made on credit is charged to the defendants, which could not be done in this form of action, because if they had no right to sell on credit, they would only be liable for unskillful management, and not for money had and received.

We have arrived at a different conclusion. If the defendants had no right to sell on credit, as appears from the evidence, having the right to sell, the sale must be taken, in reference to the rights of the plaintiff, as having been for cash. To the defendants belong the demand which the sale created against their vendee, and they are liable to the plaintiff as for money had and received.

Judgment affirmed.

MURRAY, C. J., concurred.

DISSOLVED FIRM CONTINUES IN EXISTENCE FOR MANY PURPOSES: *Ferreira v. Sayres*, 40 Am. Dec. 496; *Houser v. Irvine*, 38 Id. 768; *Kinsler v. McCants*, 53 Id. 711; *Brown v. Higginbotham*, 27 Id. 618.

ACTUAL NOTICE OF DISSOLUTION OF FIRM must be brought home to a person dealing with the firm: *Prentiss v. Sinclair*, 26 Am. Dec. 288, and note, where the whole subject of notice of dissolution of partnership is discussed. See also *Nott v. Douming*, Id. 491; *Pitcher v. Barrows*, 28 Id. 306; *Watkinson v. Bank of Pennsylvania*, 34 Id. 521.

THE PRINCIPAL CASE IS CITED in *Williams v. Bowers*, 15 Cal. 321, to sustain the proposition that an ostensible partner retiring from the firm must give notice of his retirement, or he will be liable to creditors of the continuing firm on contracts made by them after his retirement.

CLYMER v. WILLIS.

[3 CALIFORNIA, 363.]

MONEY IN HANDS OF SHERIFF, collected under execution, is not subject to attachment or garnishment, as a debt due to the plaintiff in execution, but is in the custody of the law until finally and properly disposed of.

IF CREDITOR OF PLAINTIFF IN EXECUTION WAS OTHERWISE REMEDILESS, equity might decree a sequestration of money in the hands of the sheriff, collected under such execution.

SHERIFF ACQUIRES SPECIAL PROPERTY in money collected by him under execution, and if such money is at any time subject in his hands to other process, he can not serve it himself, but it must be executed by the coroner.

ACTION against a sheriff to compel him to pay over money collected by him under an execution in favor of plaintiff. It appears that plaintiff Clymer, in November, 1852, recovered a judgment against one Sanderson, upon which an execution was issued and delivered to the sheriff November 6, 1852. Under this execution the said sheriff collected some three thousand five hundred and forty dollars. November 20th three writs of attachment in favor of different plaintiffs and against Clymer, the plaintiff herein, were delivered to said sheriff, by virtue of which he levied upon the gross sum of six hundred and fifteen dollars and fourteen cents of the money in his hands, collected by him for Clymer as aforesaid. Plaintiff demands judgment against defendant for said last-mentioned sum. The court below gave judgment for defendant, and plaintiff appealed, and for error alleges that this money was in the custody of the law, and not subject to attachment.

Conger and Aukeny, for the appellant.

By Court, HEYDENFELDT, J. The remedies of attachment and

garnishment are the creatures of statute, and can not be extended to cases not named in the act.

Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in execution, but is in the custody of the law until finally and properly disposed of. It can not therefore be the subject of attachment or garnishment. If the attaching creditor of the plaintiff in execution was otherwise remediless, it may be that chancery would afford relief by process of sequestration, but this we are not now called on to decide.

A striking irregularity in this case is the attempt of the sheriff to attach what was in his own hands. The sheriff acquires a special property in whatever comes to his hands, by virtue of his office, and if it is at any time subject in his hands to other process, to which he must necessarily be a party, such process must be executed by the coroner.

The judgment is reversed and the cause remanded.

WELLS, J., concurred.

REPLEVIN WILL NOT LIE FOR PROPERTY HELD BY OFFICER by virtue of an execution: *Spring v. Bourland*, 53 Am. Dec. 243, and note, wherein cases both for and against this proposition are cited.

MONEY IN HANDS OF SHERIFF, being in the custody of the law, is not subject to attachment as the property of the execution plaintiff: *Bowden v. Schatzell*, 23 Am. Dec. 170; *Dawson v. Halcomb*, 13 Id. 618; *Prentiss v. Bliss*, 24 Id. 631; *Blair v. Cantey*, 42 Id. 360; *Marvin v. Hawley*, 43 Id. 547, and notes to above cases. See also cases cited in note to *King v. Moore*, 41 Id. 44. But the surplus money, in the hands of a sheriff, after satisfaction of the execution, are subject to attachment by a creditor of the execution debtor: *Tucker v. Atkinson*, 43 Id. 650; *King v. Moore*, 41 Id. 44. "The authorities are very nearly unanimous in sustaining the proposition that when a sheriff or constable has collected money on execution, it can neither be levied upon nor garnished by the same or another officer, under a writ against the judgment creditor:" Freeman on Executions, sec. 130.

WHEN SHERIFF IS PARTY TO ACTION, process must be directed to the coroner of the county: *Bowen v. Jones*, 55 Am. Dec. 426, and note.

THE PRINCIPAL CASE IS CITED in *Harvey v. Steinagel*, 33 Ill. 516, to the point that money in the hands of a sheriff, collected on execution, can not be attached as the property of the plaintiff in the execution. It is also cited to the same point in *Hill v. The La Crosse & M. R. R. Co.*, 14 Wis. 291.

LUBERT v. CHAUVITEAU.

[3 CALIFORNIA, 458.]

OWNER OF GOODS MAY MAINTAIN ACTION AGAINST TORTIOUS POSSESSORS THEREOF as consignees or factors, and it is competent for him to introduce evidence showing the manner in which they became possessed of

the goods, even though such proof should establish such possession to have been wrongful. He may waive the tort.

REFORMED PLEADING UNDER CODE has abolished the distinction between actions *ex contractu* and *ex delicto*, but the principles of law governing these actions remain unchanged.

OWNER OF GOODS WHO ELECTS TO PROCEED AGAINST TORTIOUS POSSESSORS THEREOF, as consignees or factors, thereby ratifies the act of his agent in delivering said goods to them, and they must be considered as the authorized consignees and commission merchants of said owner, and entitled to the rights and benefits arising from this relation, such as commissions and an allowance for disbursements.

IN ACTION BY OWNER OF GOODS AGAINST TORTIOUS POSSESSORS THEREOF, as consignees or brokers, the measure of damages is the net proceeds of the sales of said goods. In such action the defendants need not set up in their answer their claim to commissions and disbursements, either as new matter or by way of set-off, in order to have them allowed.

APPEAL from the fourth judicial district. Plaintiff, a resident of Bordeaux, France, alleged for cause of action that in September, 1850, he shipped a quantity of merchandise, which he particularly described, to Hugens Brothers or order, commission merchants in San Francisco; that said goods, when they arrived, were placed by Hugens Brothers in the hands of defendants, also commission merchants, to be sold for the use of plaintiff, and that defendants accepted the same, and agreed to render an account and pay the proceeds of the sales of said goods to plaintiff; that they had sold said goods, and had refused to pay over the net proceeds, or any part thereof, to plaintiff, although often thereunto requested, wherefore plaintiff demands judgment for two thousand five hundred dollars, the value of said goods, for costs, etc. After the answer of defendants was filed, which was a general denial, a trial was had, at which the following facts were brought out: The goods were received as alleged by Hugens Brothers, with instructions to sell for cash and remit to plaintiffs. While this consignment of goods was on the way over, Hugens Brothers became indebted to defendants herein in the sum of five thousand dollars, and they demanding additional security, Hugens Brothers conditionally pledged with them two bills of lading on the way from France, one of which was the duplicate of plaintiff's goods. It was agreed that defendants should hold these bills as security until Hugens Brothers could procure securities of their own. They at this time exhibited to defendants their letter of instruction, and told defendants that they had no interest in or lien upon the goods mentioned in plaintiff's bill of lading, that the goods belonged to plaintiff, who was not indebted to them in any sum. Some time after

this, Hugens Brothers placed in the hands of defendants a large consignment of goods, which they agreed to take in lieu of the bills of lading which had been pledged in them, and as a satisfaction of all indebtedness between them. When plaintiff's cargo arrived, defendants were requested to hand over the bill of lading or permit the goods to be landed, which they refused to do, as the account between them and Hugens Brothers was not closed by the sale of the above-mentioned consignment of goods. At this time plaintiff's goods were worth four thousand five hundred dollars or five thousand dollars. The defendants retained entire control of these goods, and sold a large quantity of them, which, from the defendants' books, brought some three thousand one hundred and twelve dollars and ninety-two cents. After the above facts had been brought out, defendants' counsel moved for a nonsuit, on the ground that the complaint was not supported by the evidence. The court refused to grant this motion, and defendants excepted. Defendants then proved that part of the goods had been destroyed by fire, that they had paid duties and custom-house charges to the amount of nine hundred and ten dollars and fifty cents, and that the rate of commission at that time was ten per cent. To the introduction of all this evidence plaintiff objected, but the court overruled his objection, and plaintiff excepted. The court refused to permit defendants to produce the books of the firm and give an account of the sales taken therefrom, and they excepted. The jury found for plaintiff for two thousand five hundred dollars, and defendants appealed.

IV. H. Sharp, for the respondent.

By Court, WELLS, J. The first assignment of error is, that the evidence does not support the contract as laid in the complaint, and therefore that the court erred in refusing to order a nonsuit.

The plaintiff in the court below waived the tort (if any had been committed), and brought his action against the defendants as factors, to account for goods sold by them, and to restore the amount of the net proceeds arising from the sale. This he had a right to do, according to well-established principles of the common law, and it was competent for him to introduce evidence showing the manner in which the defendants became possessed of the goods; and although the proof should establish the fact that the defendants became possessed of them wrongfully, it would still be sufficient to maintain an action

against the defendants as consignees or factors for the net proceeds.

One of the objects sought by the reformation in the forms of pleading was to provide for cases like the present. The distinctions in the form of actions *ex delicto* and *ex contractu* are abolished, and one form of action only substituted, and the plaintiff here has brought his action in the form prescribed by the code; but the principles of law which govern the case remaining unchanged, he introduced testimony to maintain his action as he would have done under the common-law system of practice in an action of *assumpsit*, based upon a similar state of facts; and the court committed no error in refusing a nonsuit, either on the ground of variance or insufficiency of proof to sustain the complaint.

But the plaintiff having elected to proceed against the defendants as factors instead of tort-feasors, he thereby ratified the act of his agents, Hugens Brothers, in transferring the merchandise and the bills of lading into the hands of the defendants; and the defendants, who are commission merchants, as shown by the complaint, must be considered as acting as the authorized consignees and commission merchants of the plaintiff, and entitled to the rights and benefits arising from this relation. It follows that the plaintiff could only recover from the defendants the net proceeds arising from the sale and disposition of the merchandise, after deducting the necessary charges and disbursements, and the court erred in admitting proof of the value of the goods at the time of the demand and refusal to deliver.

The defendants are not charged with non-performance or negligence, nor with fraud in the sale, and no cause is shown why they were not entitled to commissions; the strict measure of damages, therefore, was the net proceeds after deducting the necessary charges, disbursements, and commissions, and the court erred in refusing to admit in evidence the books of defendants' firm to prove the account of the sale of the goods. It was not necessary, as is insisted upon, for the defendants, who were recognized by the plaintiff as factors, and prosecuted as such, to set forth in their answer those charges, disbursements, and commissions, either as new matter or by way of set-off, to a claim for the net proceeds of the sale. And the court erred in charging the jury that it was for them exclusively to say what amount the plaintiff was entitled to recover, or that the defendants were liable for the value of the goods at the time of the demand and refusal. Therefore, in order that these

errors may be corrected, the judgment of the court below is set aside, and a new trial ordered.

HEYDENFELDT, J., concurred.

On rehearing, December 5, 1853, the above opinion was reaffirmed.

ONE MAY WAIVE TORT AND SUE ON IMPLIED CONTRACT, only on those cases where the defendant has derived some benefit from the tort: *Webster v. Drinkwater*, 17 Am. Dec. 238. In the note to this case the entire subject of waiver of tort and suit upon the implied contract for money had and received is discussed: See also *O'Conley v. City of Natchez*, 40 Id. 87, and note; *Osborn v. Bell*, 49 Id. 281, and note; Addison on Torts, 33; Cooley on Torts, 91-96. As to the change brought about in pleading by the adoption of the codes, see Pomeroy's Remedies and Remedial Rights, 134.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

SHELDON v. HARTFORD FIRE INSURANCE Co.

[22 CONNECTICUT, 235.]

WRITING INTENDED TO BE PART OF CONTRACT MAY BE INCORPORATED INTO IT by a proper reference, as well as by an extended recital. And where in a policy of insurance a reference is made to a survey consisting of answers given by the insured to questions proposed by the insurers, some of which are intended to call forth a minute description of the premises to be insured, and others to enable the insurers to determine the nature and extent of the risk, the reference will not be regarded as intended merely to obtain a fuller description, but as intended to incorporate the whole of the survey into the policy, and the answers therein applicable to the subject-matter will bind the insured.

PAROL TESTIMONY IS NOT ADMISSIBLE TO EXPLAIN OR QUALIFY WRITING which is expressed in precise terms and free from ambiguity.

ANSWER IN POLICY OF INSURANCE TO QUESTION WHETHER WATCHMAN IS EMPLOYED on the premises during the night is a representation material to the risk, which must be regarded as obligatory on the insured.

ACTION on a policy of insurance. The eighth interrogatory referred to in the opinion was in these words: "Is there a watchman in the mill during the night? Is there a good watch-clock? Is the mill left alone, at any time, after the watchman goes off duty in the morning, till he returns to his charge at evening." And the answer was as follows: "There is a watchman nights—no clock. Bell is struck every hour from eight o'clock p. m. till it rings for work in the morning. Only at meal times, on the sabbath, and other days when the mill does not run." John S. Fenn was the superintendent and agent of the plaintiffs, and the plaintiffs claimed that said Fenn had stated to the agent of the defendant, at the

time of the examination of the premises, that the plaintiffs were not in the habit of keeping a watchman at the establishment between twelve o'clock Saturday night and twelve o'clock Sunday night. The court, for the purpose of enabling the jury to pass upon the evidence, admitted the parol testimony offered by the plaintiffs, *pro forma*. The jury found for the plaintiffs, and the defendants moved for a new trial. The other facts appear from the opinion.

Perkins and Chapman, and Deming, for the motion.

Hungerford and Toucey, contra.

By Court, ELLSWORTH, J. Three questions are presented for our consideration: 1. The propriety of introducing parol testimony; 2. The incompleteness of the contract of insurance; 3. The non-payment of the premium. The two last are resolved chiefly, if not entirely, into questions of fact for the jury, which we shall not discuss, since some evidence was properly before them for their consideration. If they have mistaken its force, this motion will not give the defendants redress. As to the first question, we think there must be a new trial.

The defendants claim that the entire contract has been reduced to writing: their part, in the policy of insurance; the plaintiffs' part, in the questions and answers in the survey, so called, referred to in the body of the policy. The defendants say these stipulations and conditions, though not specifically repeated in the policy, are by reference made to constitute a part of the contract as fully as if the survey had been incorporated at full length; and that the survey, being in writing, is so precise and free from ambiguity, that parol testimony can not be admitted to explain or qualify it, without denying first principles. On the other hand, the plaintiffs claim that the survey is not referred to to express the stipulations obligatory on the insured, but for the purpose of designating and identifying the building in which the property is to be kept or manufactured, and that the true representation was the statement made by John S. Fenn to the agent. The plaintiffs make no question that they have not kept the stipulations and conditions contained in this survey as it reads, and especially that they have not kept a watch in the mill, as required in the answer to the eighth interrogatory; as this court held was required, in the case of *The Glendale Woolen Co. v. The Protection Ins. Co.*, 21 Conn. 19 [54 Am. Dec. 309], and that they have no case here, if the entire survey is held to be binding. Nor do they pretend

that this stipulation is unimportant, but they insist that the survey is not their representation, and that the true representation was, as we have said, the statement made to said agent by said Fenn a short time before the issuing of the policy.

We are persuaded the view taken by the defendants' counsel is the true one. All the survey, as much as any part of it, is incorporated into the policy of insurance, and constitutes the conditions of the plaintiffs' contract; and hence every part applicable to the subject-matter (and the eighth interrogatory certainly is) is to be regarded as obligatory on the insured, whether the survey is to be held a warranty, as in the policy, or a representation material to the risk, to be substantially kept and performed, which latter is the character we are inclined to give it. We know no reason why a writing intended to be a part of a contract may not be held to be incorporated into it by a proper reference as well as by an extended recital. The reference in this case, in our judgment, is of such a character. It was made, we think, to show what then were and should continue to be the stipulations of the plaintiffs touching the property insured. This the plaintiffs deny: they say it was for the description and identification of the factory building. Now, it seems to the court that this purpose was altogether unnecessary and superfluous, since it was already stated in the policy that the building was a factory building, occupied by the plaintiffs, situated in Glendale. If more than this was wanted, as the ground assumed by the plaintiffs seems to allow, viz., a more minute description of the building, it was, that the insurers might be better informed of the risk, so far as these particulars were important, in estimating the degree of it. But if so, are not the other parts of the survey equally important and obligatory, and especially the eighth interrogatory and answer? It is incredible that the insurers were so anxious to know more minutely the size and kind of material of the factory building, etc., and therefore incorporated the survey into the policy, to secure themselves to that extent, while other parts of the survey, touching the use and condition of the building, equally important, are passed over as unworthy of attention; such as the kind of business to be done in the mill, the mode of heating and lighting it, the position of water-casks and forcing pumps, the kind of stoves and fuel used in the mill, the continuance of a watch by night, with a good watch-clock, to insure constant watchfulness; the number of hours in the twenty-four the factory is run; in what manner friction matches are kept in the mill;

that no smoking or drinking of liquor is to be allowed on the premises; whether the mill is run by the proprietor or tenants; the existence of an organized fire company in the neighborhood, and the like. Who has a right to say that any of these are not conditions and stipulations meant to be incorporated into the policy, when the survey is referred to, generally, for information? The directors of the company must have been beside themselves not to have secured the company at all in these and the like particulars; but it is so, if the survey is to be rejected.

When the plaintiffs admit that by the reference the survey becomes a part of the contract, to the extent they allow in argument, we think they yield the question to their opponents; as after this they can not make a sensible distinction between what they admit and what the defendants claim.

Besides, if the survey is to be rejected by the plaintiffs, except to the extent admitted, where are we to look for any stipulations and conditions on the part of the insurers? or are there none? Is this (a case of more than ordinary importance) an exception to all others? Can we believe that, with the vigilance of the defendants manifested by their requiring a printed survey of numerous and most discriminating questions, to be forwarded to the company, that they may have full information of anything material to the risk, they wanted only to know in this instance the description and identification of the factory building, and for that purpose made reference to the survey?

It should be remembered, likewise, that this survey had been made some five months before the date of this policy, in behalf of these plaintiffs, and was sent by the very agents who issued the present policy to the Protection Insurance Company, who had issued a policy upon that survey, payable, in case of loss, to the plaintiffs. There it remained, and reference was made to it as there, and we can not doubt it was meant and agreed by all parties that it should be referred to as the proper and true survey in this case.

On the whole, viewing this survey as the contract of the plaintiffs, the case already mentioned of *The Glendale Woolen Co. v. The Protection Ins. Co.*, *supra*, settles the question; there upon a kindred question we held that the eighth interrogatory and answer were a clear, certain, and definite contract, not susceptible of ambiguity, and not open to parol proof.

If Mr. Fenn's story, which is denied by the agent of the defendants (and he made the contract of insurance, and issued the policy in pursuance thereof), is true, then it is obvious the policy

and survey do not contain the true contract between the parties, and should have been amended; but this can have no effect in this case; we take the writings as they are.

In this opinion the other judges concurred, except WATZ, J., who tried the cause in the court below, and was therefore disqualified.

New trial advised.

PAROL EVIDENCE IS GENERALLY INADMISSIBLE TO VARY WRITING: See *Porter v. Pierce*, 55 Am. Dec. 151, note 153, where other cases are collected; *Waddell v. Glassell*, 54 Id. 170, note 172; *West v. Kelly*, Id. 192; *Frederick v. Youngblood*, Id. 209. The principal case is cited in *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 109, to the point that if there is no imperfection or ambiguity in the language of a contract, it will be considered as expressing the entire and exact meaning of the parties, and no evidence of extrinsic matters or usages will be received to vary the terms expressed.

CONCEALMENT, WHEN FATAL TO INSURANCE POLICY, AND WHEN NOT: See *Gates v. Madison Co. M. I. Co.*, 55 Am. Dec. 360, note 369.

ANSWER TO QUESTION WHETHER WATCHMAN IS EMPLOYED on premises insured is material to the risk: *Glendale W. Co. v. Protection I. Co.*, 54 Am. Dec. 309.

WHERE POLICY REFERS, IN EXPRESS TERMS, TO APPLICATION, or other papers connected with the risk, and adopts them as part of the contract of insurance, they become a part of the policy: *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 303, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 473, to the point that when agents of insurance companies bind their principals, and when they bind only themselves, is a question of fact more than of law; and in *Woodbury S. B. v. Charter Oak Ins. Co.*, 31 Id. 525, to the point that the courts of Connecticut have maintained the integrity of contracts, and the necessity of a strict compliance with all conditions affecting their validity, in some instances almost to the denial of justice.

HEDGE v. CLAPP.

[22 CONNECTICUT, 262.]

IMPEACHMENT OF WITNESS BY PROOF OF CONTRADICTIONARY STATEMENTS.—A witness may be impeached by proving that he has made statements out of court contradictory to those made by him on the trial, without first inquiring of him, on cross-examination, whether he has made such prior contradictory statements.

ENGLISH RULE FIRST RECOGNIZED IN QUEEN'S CASE, 2 Brod. & B. 301, that a witness can not be impeached by proving that he has made contradictory statements out of court, unless he has been first inquired of touching such contradictory statements, has never been adopted in Connecticut, either by legislative enactment or judicial decision. Although this rule is a safe and conservative one, calculated to protect

the just rights of witnesses and to elicit the truth, and one to which it is very proper to adhere, subject to such exceptions as a sound discretion may suggest, yet a failure to apply it will not be ground for reversal of the judgment, particularly in a case where the witness was still within the reach and subject to the control of the party calling him, after the impeaching testimony had been given, and where he might have been called for the purpose of explanation.

Assumpsit tried before a jury in the county court of Hartford county. There was a verdict for the defendant, upon which a judgment was entered, which was affirmed by the superior court, and thereupon by motion in error the case came to this court. The other facts appear from the opinion.

Hubbard, for the plaintiff in error.

Welles and Hungerford, for the defendant in error.

By Court, CHURCH, C. J. This is a motion in error to reverse the judgment of the superior court, by which a judgment of the county court, on motion in error, had been affirmed.

The ground of exception to the decision of the county court is, that witnesses were called by the defendant to testify, and did testify, that Dorcas H. Chandler, who had before been called by the plaintiff to testify, had, out of court, stated to them facts contradictory to and inconsistent with her testimony given in chief for the plaintiff, without being inquired of by the defendant on her cross-examination, and without testifying whether she had made to the defendant's witnesses or others any such contradictory or inconsistent statements as sworn to by them. This testimony, thus introduced by the defendant upon objection, was admitted by the county court; and this without recalling the said Dorcas, who might have been recalled to contradict or explain.

The question before us is not what has been, either anciently or in modern times, or what we may think would be, a reasonable or convenient practice, resting in the discretion of the court, in the examination of witnesses, either as to the order or subject of such examination; but whether any rule or principle of law, of which the plaintiff had a right to avail himself, has been violated by the county court, so that he is entitled as a matter of right to demand a reversal of the judgment of that court.

In the admission or rejection of testimony, and in regard to many matters occurring in the course of trials, the due course of justice demands, to some extent, the exercise of a discretionary power by the court. In exercising such discretion, courts frequently regard former usages and practice, although when

propriety seems to demand it they pass by such practice, and without violating any legal rights of parties: thus they often depart from the usual course of procedure to protect a witness from surprise and embarrassment; or to expose one to detection who seems disposed to conceal or prevaricate, etc.

In this state we do not believe there has been a uniformity of usage in conducting the examination of witnesses who have made contradictory statements out of court since the *Queen's Case*, 2 Brod. & B. 301, in 1820, although before that time a contradiction of a witness might be proved without qualification. Sometimes the impeaching proof has come in without objection; sometimes the first witness, upon cross-examination, has been inquired of generally whether he has ever made a different representation of facts, without referring to circumstances or persons, and this has been very frequently done; and sometimes the course now insisted upon by the plaintiff as the only proper one has been pursued. We conclude, therefore, that the legal profession here has never considered the law on this subject to be fixed, but has treated the subject rather as a matter of practice in the examination of witnesses, and subject to the discretion of the court.

We do not very well see how an unyielding rule can be prescribed, in conformity with the rule claimed by the plaintiff, which shall apply consistently to all cases. A great portion of the evidence in our courts consists of depositions, and it would be found quite impossible, in depositions taken *ex parte*, to apply any such principle or practice.

The judges in the *Queen's Case*, *supra*, adverted to an existing usage, in support of the advice which they gave to the house of lords, establishing the rule of evidence now relied upon by the plaintiff; but they refer to no book or reported case upon which they relied as an authority; and we believe that no such existed, in any such form as to furnish evidence that such, before that time, was the common law of the land or of the courts, rather than a mere rule of practice, which some or more of the judges had, in the exercise of a discretionary power, followed at the circuits. Indeed, the English judges, in subsequent cases, appeal, in support of the rule, which is certainly now well established in their courts, solely to the *Queen's Case*, as its origin: *Angus v. Smith*, 1 Moo. & M. 473; *Crowley v. Page*, 7 Car. & P. 789. If this be so, it can not be claimed properly that the law, as received and understood in this state before that case, has been abrogated and abandoned,

and the new principle ingrafted into our system of jurisprudence, unless by some statute provision or judicial decision of our own; and there has been no such. We must therefore look for our law on this subject to a period before the decision of the *Queen's Case*.

Chief Baron Gilbert, in his treatise on evidence, the first book of authority on this branch of the law, does not allude to any principle, known in his time, which required, on cross-examination, that a witness should be inquired of as to his acts or declarations out of court, in order to admit evidence, by way of impeachment, of his inconsistent testimony in court. He gives the principle without qualification: "A prisoner may bring evidence to prove the witness gave a different testimony before a justice of the peace or at another trial:" Gilbert's Law of Ev. 31.

Mr. Peake asserts the principle, without condition or qualification, that "declarations made by a witness, on the same subject, contrary to what he swears on the trial, may be given in evidence to impeach his credit:" Peake's Ev. 89. So Phillips, in the first edition of his very valuable work, published in the year 1817, three years before the trial of Queen Caroline, states the law in the same manner; although he gives it differently in subsequent editions, published after that trial: Phill. Ev., 1st ed., 230. In *De Sailly v. Morgan*, 2 Esp. 691, it was decided that a letter written by a witness might be read to contradict his testimony in chief, although no allusion was made to it on his cross-examination. In *Christian v. Coombe*, Id. 489, a protest signed by a witness was admitted for the same purpose.

No qualification of the rule or practice, as laid down in the authorities above referred to, is suggested by Judge Swift, in his system or in his law of evidence, nor in his digest, nor have we any decided case adopting the modern qualification as recognized in the *Queen's Case*.

In the case of *Tucker v. Welsh*, 17 Mass. 160 [9 Am. Dec. 137], this subject was brought under the notice of the supreme court of Massachusetts, and well considered, and in the result the court say: "Whatever may be the reasons for adopting the practice in England, of first advertising a witness on what grounds he is about to be impeached, we are satisfied that such practice has never prevailed here. In England it is rather a matter of practice than a rule of evidence, as would seem by the opinion of the judges in the *Queen's Trial*. It may date its origin long since we were bound by English laws, and if so, would have no force here, except by adoption."

The same views, and we think they are correct, are expressed by the court in Maine, in the case of *Ware v. Ware*, 8 Greenl. 42.

We think we are justified, from the foregoing view of the law, in our opinion, that however proper and salutary the practice may be, as now established by the courts in England, on the subject we have been considering, yet the rule has never been adopted as a principle of our law of evidence, that the credit of a witness can not be impaired or impeached, by proving contradictory statements made by him out of court, unless his mind and recollection have been called to them on his cross-examination, so as to justify us in reversing a judgment as a matter of legal right, because such rule or practice has been disregarded. And it is important, we think, to notice the fact that the opinions expressed by the judges in the *Queen's Case* were intended to influence a court in the progress of a pending trial, and were not pronounced upon the question whether a judgment already rendered should be reversed; if they had been, the judges would have decided explicitly whether the course of examination thus approved by them was a matter of judicial practice merely, or required by any known and settled principle of the law.

In the present case, at any rate, we see no cause for the plaintiff's complaint. His witness was still within his reach, and subject to his control, after the impeaching testimony had been heard; and all the cases agree in determining that in such case the witness could have been recalled by the plaintiff for the purpose of explanation.

Now, although for the reasons suggested we can not reverse this judgment, yet we feel that in many if not in most cases the rule of practice and course of examination of witnesses, as recognized and established by the courts of England, where contradictory representations are relied on for the purpose of impeachment, is a very safe and conservative one, as protecting the just rights of witnesses, as well as calculated to elicit the truth, and one to which it will be very proper to adhere, subject to such exceptions as a sound discretion may from time to time suggest.

In this opinion the other judges concurred, except WATZ, J., who tried the case in the court below and was disqualified.

Judgment affirmed.

IMPEACHMENT OF WITNESS BY PROOF OF CONTRADICTIONARY STATEMENTS: See *Moore v. Bellis*, 53 Am. Dec. 771; *State v. George*, 49 Id. 392, note 396; *Sealy v. State*, 44 Id. 641, note 649, where other cases are collected. The principal case is followed on this point in *Butler v. Cornwall Iron Co.*, 22

Conn. 357; and in *McGinnis v. Grant*, 42 Id. 79, and in *Tomlinson v. Town of Derby*, 43 Id. 565, it is cited in support of the proposition that it rests in the sound discretion of the court to determine the question whether or not a witness can be impeached by proving that he has made prior contradictory statements, without asking him if he made such statements.

OGDEN v. RAYMOND.

[22 CONNECTICUT, 379.]

IN ASSUMPSIT FOR SERVICES RENDERED AS SCHOOL-TEACHER, evidence is admissible to prove that the defendant contracted with the plaintiff individually, and not as a public officer.

SCHOOL TRUSTEE DERIVING HIS OFFICIAL CHARACTER FROM GENERAL LAW and the election of the people of a given district is as much a public agent as if he were the immediate agent of the state or of one of its political divisions.

AGENT ACTING EITHER IN PUBLIC OR PRIVATE CAPACITY IS NOT NECESSARILY MADE LIABLE, although he does not give a cause of action against some one else.

ONE WHO ASSUMES TO CONTRACT IN NAME OF ANOTHER AS HIS PRINCIPAL, with an honest intent, openly and fully disclosing all the facts touching his supposed authority, or which may be fairly implied from his situation, especially if he provides against his personal liability in any event, can not be held liable, unless he be guilty of fraud or false representation.

AGENT CAN NOT BE SUED AS CONTRACTING PARTY IN CONTRACT, unless it contains apt words to charge him as such.

RULE THAT IF AGENT DOES NOT BIND HIS PRINCIPAL he binds himself needs qualification, and is not universally correct. Where an agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and binds him as an individual; but if the contract does not contain a personal undertaking, he is not personally liable.

WHERE AGENT ACTING IN PUBLIC BUSINESS ENTERS INTO CONTRACT for the benefit of the public, he is presumed to act in his official capacity; but if he is acting in private business, there is no presumption for or against, and he is or is not liable, according to the language used.

ASSUMPSIT for labor and services by the plaintiff done and rendered in teaching a school in a certain district in the county of Westchester, in the state of New York, at the special instance and request of the defendant. On the trial, the plaintiff, against the objection of the defendant, was allowed to introduce testimony to prove the character in which the defendant contracted for the services of the plaintiff. The defendant claimed that he made the contract with the plaintiff as the trustee of the school district, and that in making such contract he was a public agent, and could not be held personally liable, unless he was

guilty of fraud or misrepresentation, or expressly contracted on his own personal responsibility. The jury returned a verdict for the plaintiff. The other facts appear from the opinion.

Butler and Carter, for the motion in error.

Hawley, contra.

By Court, ELLSWORTH, J. The first question is the admissibility of evidence to prove the character in which the defendant contracted for the services of the plaintiff—whether individually or as a public officer. On this point we think the ruling of the court is not subject to objection. The evidence conduced to establish the point for which it was offered, and that was sufficient to make it admissible.

In the next place, the defendant claimed that he made the contract as a public agent, and therefore was not personally liable, unless, indeed, in making the contract he had been guilty of fraud or misrepresentation, or had superadded his personal engagement. The plaintiff, on the other hand, claimed that the defendant did not contract as a public agent, and furthermore, at all events must be liable unless he contracted in such a manner “as to give the plaintiff a remedy somewhere else.” The court ruled in conformity to the claim of the plaintiff; and herein, we think, entertained an erroneous view of the law. The court held that, in point of law, the defendant was not a public agent, and could not be classed with public agents, who are presumed, while acting in public business, to act in an official capacity. We do not readily apprehend why the defendant, deriving his public and official character from the general law and the election of the people of a given district, under the law, may not be held to be a public agent as much as if he were the agent of the state immediately, or of a county, town, society, or school district. Wherein is the difference? All derive their power from the same source, parceled out, only to be exercised in different jurisdictions and for different purposes. Such we understand to be the doctrine of our courts, as held in *Adams v. Whittlesey*, 3 Conn. 564; *Perry v. Hyde*, 10 Id. 338; *Sterling v. Peet*, 14 Id. 248; *Johnson v. Smith*, 21 Id. 627. And the same is the law in New York: *Olney v. Wickes*, 18 Johns. 124. Often has it been held that selectmen and other kindred officers are public agents, officers of the law, though elected by their respective towns and districts.

We think, likewise, upon the second point made, that it does not follow that an agent, acting either in a public or private

capacity, is of necessity made personally liable, although he does not give a cause of action against some one else. We believe the law to be, that if a person assumes to act and enter into contracts in the name of another as his principal, and does this with an honest intent, openly and fully disclosing all the facts touching his supposed authority, or which may be fairly implied from his situation, and especially if he provides against his personal liability, in any event he can not be held liable unless he be guilty of fraud or false representation; and even then he is not necessarily liable on the contract itself.

Story, in his treatise on agency, p. 322, sec. 234 a, says: "It seems clear that in no case can an agent be sued, on the very instrument itself, as the contracting party, unless there are apt words therein so to charge him; thus, if a person acting as agent for another should without authority, or exceeding his authority, make and execute a deed in the name of his principal, and not in his own name, the agent would not be liable thereon, although it would not bind the principal." The same was held in *Downman v. Jones*, 9 Jur. 454; *Polhill v. Walter*, 3 Barn. & Adol. 114. The same doctrine was asserted in Massachusetts, in *Long v. Colburn*, 11 Mass. 97 [6 Am. Dec. 160]; *Ballou v. Talbot*, 16 Id. 461 [8 Am. Dec. 146]; and the same in Pennsylvania, in *Hopkins v. Mehaffy*, 11 Serg. & R. 129. The cases in New York are somewhat different, but we think there is no question but that the rule laid down by Judge Story is the rule of our courts. We would especially refer to the cases to be found in 1 Am. Lead. Cas. 601, note to *Elwell v. Shaw*, and a later case, *Lewis v. Nicholson*, 12 Eng. L. & Eq. 433.

We are aware that it is not unfrequently laid down as a rule of law that if an agent does not bind his principal he binds himself; but this rule needs qualification, and can not be said to be universally true or correct, as the cases already cited abundantly show. If the form of the contract is such that the agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language, when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable; for it is not his contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct if he has knowingly or carelessly assumed to bind another without authority; or, when making the contract, has concealed the true state of his authority, and falsely

led others to repose in his authority; but, as we have said, he is not of course liable on the contract itself, nor in any form of action whatever.

The question in these cases will be found to be one of construction of the language and meaning of the person who attempts to act for another, and is a question often attended with very great difficulty and doubt; but when the intention is ascertained, that intention should ever be the rule for deciding whose contract it is. The cases are exceedingly conflicting, and unsatisfactory, though they contain some principles universally acquiesced in. If the agent is acting in public business, and enters into a contract for the benefit of the public, he is presumed to act in his official capacity, as in *Hodgson v. Dexter*, 1 Cranch, 845; but if he is acting in private business, there is no presumption for or against, and he is or is not liable, according to the language used. The county court held that the defendant did not bind those for whom he apparently acted, and was therefore of necessity liable himself. This is not correct.

We have no occasion to comment on other facts of the case, although we think that in a subsequent part of the charge there is some obscurity in the language employed in instructing the jury; but we do not think it necessary to go into the question; for we mean to place our decision upon the errors already pointed out.

In this opinion the other judges concurred.

Judgment to be reversed.

AGENT ACTING WITHIN SCOPE OF HIS AUTHORITY, and not concealing his agency, is not liable on a contract made for the benefit of his principal: *Hall v. Huntoon*, 44 Am. Dec. 332, note 335, where other cases are collected; *Bank of Rochester v. Monteath*, 43 Id. 681, note 684. The principal case is cited in *Taylor v. Shelton*, 30 Conn. 128, as a case in which the question as to the form of relief in a case where an agent may be sued for fraud and misrepresentation in acting for another when he had no authority, is much discussed. The only remedy against one who assumes to act for another without authority is an action on the case for falsely assuming authority to act as agent: *Duncan v. Niles*, 32 Ill. 534, citing the principal case.

ONE ASSUMING TO ACT AS AGENT FOR ANOTHER does not necessarily render himself liable: *Newman v. Sylvester*, 42 Ind. 112, citing the principal case.

PUBLIC AGENTS, LIABILITY OF, ON CONTRACTS MADE FOR PUBLIC: See *Miller v. Ford*, 55 Am. Dec. 687, note 692, where other cases are collected.

HATCH v. SPOFFORD.

[22 CONNECTICUT, 433.]

SUIT IN EQUITY PENDING IN COURT OF ANOTHER STATE BETWEEN SAME PARTIES, and for the same matter, is not cause for abatement of an action at law subsequently commenced in Connecticut.

ACTION of account. The facts appear from the opinion.

Baldwin, R. I. and C. R. Ingersoll, and Beach, for the plaintiff.

C. A. Ingersoll, for the defendant.

By Court, ELLSWORTH, J. The defendant's plea in abatement states that the plaintiff and defendant are inhabitants of the city of New York; that the plaintiff has there instituted and is prosecuting a suit against the defendant, in a court of chancery, for the same matter, cause, and thing; that the defendant has there appeared, filed his answer, and submitted to the jurisdiction of the court; that the court has full jurisdiction to adjudge the matter, and its judgment will be a conclusive bar to the controversy. To this plea the defendant has filed a demurrer, and thereby admits the truth of the allegations, at least for the purpose of trying the demurrer.

The pendency of a prior suit of the same character between the same parties, brought to obtain the same end or object, is, at the common law, good cause of abatement. It is so, because there can not be any reason or necessity for bringing the second; and therefore it must be oppressive and vexatious. But while the law is thus careful to screen the defendant from oppression and vexation, it is equally impartial and open to the plaintiff, and I may say even indulgent, in permitting him, a creditor, to seek redress by pursuing several remedies at the same time, if this is found to be reasonable and necessary. It will not countenance vexation and oppression, neither will it prevent a creditor from using, in a fair manner, the means in his power to collect his debts.

Now, the plea of a prior suit is to be looked at in just this impartial view. The rule above stated is not a rule of unbending rigor, nor of universal application, nor a principle of absolute law—it is rather a rule of justice and equity, generally applicable and always, where the two suits are virtually alike, and in the same jurisdiction. It should be remembered that a dilatory plea is not like a plea of payment, or satisfaction, or of something in bar of the merits of the claim; then it would find more favor; but its object is to cause postponement and delay—

and the language of the plea is, the proceeding is unnecessary and vexatious, and should be abated.

It is obvious, then, a second suit is not, of course, to be abated and dismissed as vexatious, but all the attending circumstances are to be first carefully considered, and the true question will be, What is the aim of the plaintiff? Is it fair and just? or is it oppressive? It is possible the defendant may not owe the debt, as the plaintiff claims he does, and may want only to present his defense in a manner as little expensive and inconvenient as possible—which right he ought certainly to enjoy; but his plea now is for delay, and delay only. If the plaintiff, by a second suit, can place his claim in a more favorable condition for obtaining redress, why should he not be permitted to do it? As where he can secure his debt by an attachment, his first suit being a summons; or where, as in *Ward v. Curtiss*, 18 Conn. 290, the first suit is found to be premature; so where he is apprehensive that, by reason of error or misapprehension, he is not in as good a condition as he could place himself in by a second suit—what reason can be assigned why he may not pursue his best remedy?

The court will not be reluctant to grant him any necessary aid; nor is a defaulting debtor a favorite of the court, to be shielded from a fair and speedy trial, in any competent court, where the debtor can be summoned to appear.

The only certain rule on this subject, which we find, is, where the parties are the same and the second suit is for the same matter, cause, and thing, or the same object is to be attained as in the first suit, and in the same jurisdiction, the second shall abate and be dismissed; and no case beyond this can be found, except perhaps *Hart v. Granger*, 1 Conn. 154, which extends the rule to suits pending in different and independent jurisdictions; nor to cases pending in the same jurisdiction, in a court of law and in a court of equity. These last qualifications are, in our judgment, most material to the case on trial, and are, we think, decisive of the merits of the plea in abatement. No case has been cited by defendant's counsel (and his elaborate researches would have found them, if in the books) of a bill in equity, pleaded in abatement to an action at law, or *vice versa*, even though the general object of both suits be the attainment of the same object; which is allowing to this defendant quite as much as the facts in his plea will justify; for the bill in equity is by one partner against the other, not only to settle his account, but to close up the partnership, while the action at law

is on a covenant to render his account. In *Laflin v. Brown*, 7 Met. 576, the court say: "The pendency of a bill in equity has not usually been considered sufficient ground for sustaining a plea in abatement; but when both suits are commenced by the same party, it may furnish a proper occasion for a motion to require the party to elect in which action he will first proceed;" so in *Blanchard v. Stone*, 16 Vt. 234, it is said by the court: "A plea in abatement to an action at law, on the ground of a pendency of a bill in equity for the same matter, between the same parties, in another court, it is believed has never been sustained in any court, foreign or domestic." There is very much in the peculiar nature and extent of the jurisdiction of these different courts to sustain this exception to the general rule. Besides, the rules of procedure and manner of execution in these courts are not alike; so a court of equity acts or not, in many cases, according to its discretion; it not unfrequently leaves the party to his remedy at law; it prescribes conditions, causes new parties to be brought before the court, and combines new matter, in any stage of the trial, by supplemental or by cross-bills, and often protracts a case, otherwise easily disposed of, for a long period of time; equity acts likewise, without a jury, and, in most countries, upon evidence taken in writing by masters in chancery, and it has a wide discretion, which it is generally found necessary to call into exercise, in winding up a partnership connection. It is true, the demurrer in this case admits that this action at law will be settled by the judgment in the suit in New York; but this is, as before said, an admission, to try the demurrer—the general question remains as before.

But if we are mistaken in this limitation of the general rule, there is another which is not less obvious and decisive, viz., the suits must be pending in the same jurisdiction. This has long been the law in England, as established in the cases of *Maule v. Murray*, 7 T. R. 470; *Imlay v. Ellefsen*, 2 East, 457; and *Ostell v. Lepage*, 10 Eng. L. & Eq. 255. In the first the court adopt this language: "This court will not take judicial notice of an arrest in a foreign country;" adding, "It would be unjust to deprive the plaintiffs of perhaps the only security they have for the payment of their debt;" and in the second, Lord Ellenborough, C. J., in giving the opinion of the court, which turned on this very point, says: "We do not see but the plaintiff has the same security (by a suit in Norway) for his demand, and all the benefit of prosecuting his suit there, which he has

here; and as we do not see that such is the case, we do not feel ourselves warranted in taking from him the benefit he is entitled to from the laws of this country." So in *Bayley v. Edwards*, 3 Swans. 710, which was a suit in Jamaica, a plea in abatement was filed, setting forth a prior suit then pending in England; the court in England, on appeal from the colonial court, held the plea was insufficient. Lord Camden said: "It is impossible to maintain this plea—it is a plea to the jurisdiction. The plaintiffs in England attempt to set up the suit here in bar of the jurisdiction of Jamaica; but the causes for allowing the plea of double suits are all where the suits are in court here, while this is a second suit, in a court which is a foreign court." The same is the law in the United States. It was so held in *Goodall v. Marshall*, 11 N. H. 88 [35 Am. Dec. 472]; *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Id. 101; *Mitchell v. Bunch*, 2 Paige, 620 [22 Am. Dec. 669]; *Newell v. Newton*, 10 Pick. 472; and *Coll v. Partridge*, 7 Met. 574. If the case of *Hart v. Granger*, 1 Conn. 171, is held to contain different views, and can not be distinguished from the above cases by reason of its peculiar circumstances, the land lying in Ohio, or as proceeding upon the idea that these states are not foreign states, which was not decided until afterwards, in the supreme court of the United States, *Buckner v. Finley*, 2 Pet. 586, we can not approve of it. If there were nothing else in the case but the fact that the plaintiffs (citizens of Connecticut) were defendants in the suit in Ohio, and of necessity subject to a withdrawal of that suit by the plaintiff, this was enough to justify the plaintiffs in getting the contract at once canceled, if they could, as they found the plaintiff within our jurisdiction. It can not be supposed that they were under the necessity of going to Ohio in order to obtain redress, when the plaintiff could, at his pleasure, leave the present plaintiffs remediless, by suffering a nonsuit. It is quite possible, if these plaintiffs had then filed a cross-bill, they could then have secured the relief which they were seeking, and to which they were entitled, upon their hypothesis; but they were not obliged to submit to such proceedings, and it might not have been expedient for them to trust their case to the decision, and a final one perhaps, of a county court of Ohio; for they had tried in vain to remove the case into the United States court.

The counsel for the defendant insists that, although these states are foreign states, except for federal purposes, the constitution of the United States has provided that full faith and credit shall be given, in each state, to the public acts, records,

and judicial proceedings of every other state, and that this provision in the constitution makes these states domestic states, or at least, that their judicial proceedings are to be held as if they were; because they are conclusive and final; and then, he insists that the general principle, already commented upon, shall be applied. We think it is not so, although we fully assent to the conclusiveness of the proceedings specified in the constitution; but the want of this conclusiveness is not the reason assigned why a prior suit, in a foreign jurisdiction, shall not abate another. It is not so said in *Maule v. Murray*, or *Im-lay v. Ellefsen*, or *Bayley v. Edwards*, *supra*, nor in the cases in this country; although some of the latter were decided after the decision in *Buckner v. Finley*, *supra*; and although the earliest case in New York was prior to *Buckner v. Finley*, yet we think the same view of our national compact had prevailed from the first. Judge Van Ness, it is true, in *Miller v. Hackley*, 5 Johns. 375 [4 Am. Dec. 372], did hold that a bill drawn on a person in another state was not a foreign bill; but it does not appear this was the point of the case, or that the question was argued or examined. Excepting this remark, we think the decision in *Buckner v. Finley* involved nothing essentially new. Such are the cases of *Warder v. Arell*, 2 Wash. (Va.) 298 [1 Am. Dec. 488]; *Hitchcock v. Aicken*, 1 Cai. 460; *Bartlett v. Knight*, 1 Mass. 401 [2 Am. Dec. 36], and cases in note; *Duncan v. Course*, 1 Mill Const. 100; 3 Kent's Com. 93. The true reason is, every country or state is entirely sovereign and unrestricted in its powers, whether legislative, judicial, or executive, and hence does not acknowledge the right of any other nation to hinder its own sovereign acts and proceedings. Nor will the courts of one country take notice of the courts of another, nor of its laws, or rules for the administration of justice; and therefore the courts of a country where a second suit is brought will not dismiss a suitor merely because initiatory steps have been taken elsewhere. It may be cause for staying proceedings: but to abate a suit is to put a final end to its existence; should it do this, it might learn too late that no adequate remedy can be had elsewhere. That country is undutiful and unfaithful to its citizens which sends them out of its jurisdiction to seek justice elsewhere. We need not repeat, that from necessity it does not know what is practicable in a foreign jurisdiction; what the mode of trial there, the rules of evidence, the statutes of limitation; or what the kind of judgment and satisfaction, and whether, if satisfaction is to be had at all, it may not be on terms prescribed by

laws favoring chiefly the interests of the debtor. This is so, even in some of these states; how much more may it be so in other states and countries. Besides, the expense, uncertainty, and delay incident to a trial abroad, perhaps in a country very remote, is, one would think, cause enough for prosecuting a suit at home. The creditor, having been obliged to sue the debtor abroad, because he was found there, and could be sued nowhere else, should not be denied the right to sue his debtor at home. In truth, to do this in such a case is not unnecessary and vexatious; for it is what the most upright and scrupulous man would do without hesitation.

As we have said, the defendant's counsel endeavors to distinguish this case from those cited from the English reports, in this: that the judgment in New York will be final and conclusive; which he says is not the case with the foreign judgment; and this is the point he has most labored; for he does not deny that the English law is against his defense, if it is to apply. Now, we remark it is by no means clear whether a judgment fairly obtained in the court of a foreign country (the court having jurisdiction of the subject-matter and the parties) is not conclusive elsewhere. This is a disputed point. If, then, it is conclusive, the entire force of the argument is taken away. It is undoubtedly so in all proceedings *in rem*, and there is very high authority that it is so in actions *in personam*. Mr. Greenleaf, in his treatise on evidence, vol. 1, sec. 546, closes his remarks on the cases by saying: "Though there remains no inconsiderable diversity of opinion among the learned judges of the different tribunals, yet the present inclination of the English courts seems to be to sustain the conclusiveness of foreign judgment;" and Judge Story says, in his Conflict of Laws, secs. 545, 550, 605: "It is indeed very difficult to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew." Is the court to review the former decision, like a court of appeal, upon the old evidence? or is the court to open the judgment, and proceed as at first, *ex æquo et bono*? The rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it, by opening all or any of the original merits, on his side, for it would be equivalent to granting a new trial. The very latest case we have seen is the *Bank of Australia v. Nias*, in queen's bench, 4 Eng. L. & Eq. 252, where the court most evidently inclined to hold a foreign judgment to be conclusive, if the

court had jurisdiction and the trial was fairly conducted; but they held it unnecessary to decide the point absolutely, because the judgment which had been rendered in Australia, a colony, had been appealed from to the queen's privy council. Lord Denman, in *Ferguson v. Mahon*, 39 Eng. Com. L. 89, and more emphatically in *Henderson v. Henderson*, 6 Ad. & El., N. S., 288, says: "That a plea to an action on the judgment of a colonial court ought to steer clear of any inquiry into the merits of the case; for whatever constituted a defense in that court ought to have been pleaded there."

There are, undoubtedly, many *dicta* that a foreign judgment may be overhauled on its merits, and is only *prima facie* evidence of the debt. It does not appear, however, says Lord Campbell, C. J., that the question has ever been solemnly decided, where the foreign court has regularly adjudicated the matter between the parties. It is open, no doubt, to the defendant to show the foreign court had not jurisdiction of the subject-matter, or the person, or that the defendants had not a fair trial. Perhaps it is in view of these exceptions, it has been said that such a judgment is only *prima facie* evidence, and may be impeached. We will not, however, pursue the subject any further; the numerous authorities on the subject are collected and ably commented on by Judge Story in his *Conflict of Laws*, and by Smith in his *Leading Cases*, vol. 2, p. 499. Most of them are likewise collected in *Greenleaf's Evidence*, and in *Cowen & Hill's notes to Phillips*. For these reasons, we advise judgment to be rendered for the plaintiff.

In this opinion the other judges concurred.

Judgment to be rendered for the plaintiff.

PENDENCY OF SUIT IN ONE STATE CAN NOT BE PLEADED IN BAR or abatement of a second action in another state between the same parties and for the same cause of action: *McJilton v. Love*, 54 Am. Dec. 449, note 455, where other cases are collected; *Loring v. Marsh*, 2 Cliff. 322; *Latham v. Chase*, 7 Fed. Rep. 524, both citing the principal case.

GOODSPEED v. EAST HADDAM BANK.

[22 CONNECTICUT, 530.]

ACTION MAY BE MAINTAINED AGAINST BANK CORPORATION FOR PROSECUTING VEXATIOUS SUIT against an individual who has suffered damage thereby.

CORPORATIONS ARE, IN MODERN TIMES, BROUGHT TO SAME CIVIL LIABILITIES as natural persons, so far as this can be done practically and consistently with their charters, and are civilly responsible, in their corporate capacities, for all torts which work injury to others.

DIRECTORS OF CORPORATION CONSTITUTE CONTROLLING POWER OF CORPORATION, and are not to be regarded merely as its agents or servants acting under a delegated authority; and the doctrine that principals are not responsible for the willful misconduct of their agents can not be applied to them.

MALICE OF CORPORATION MAY BE PROVED by proving the motives of its directors, in the same way that the motives of other associated or conspiring bodies are proved.

ACTION on the case brought against the East Haddam Bank, described in the declaration as a "corporation established by the laws of the state of Connecticut, with power to sue and be sued." The facts are stated in the opinion.

Baldwin and Bulkeley, and Tyler and Culver, in support of the motion to set aside the nonsuit.

Dutton and W. D. Shipman, contra.

By Court, CHURCH, C. J. This action is based upon the provisions of our statute, entitled "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case for malicious prosecutions, at common law.

The plaintiff alleges that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the superior court, the defendants moved for a nonsuit, on the ground that the plaintiff, by his evidence, had failed to make out a *prima facie* case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the superior court in granting the nonsuit, as we understand, was founded solely upon the ground that a corporation aggregate was not by law liable for such a cause of action as was set up by the plaintiff in his declaration; at least, no other ground of nonsuit or objection to the plaintiff's action has been argued before us. And therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, Has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think that, to turn the plaintiff round, to pursue the proposed remedy would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and in this case, at least, that there was a wrong where there is no remedy. It is notorious that ordinarily the action of bank directors is private; that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of Tilghman, C. J., in a case very similar to the present, in which it was urged that a corporation was not liable for a suit, but only the individuals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury by means of laborers having no property to answer damages," etc.: *Chestnut etc. T. Co. v. Rutter*, 4 Serg. & R. 16 [8 Am. Dec. 675]. To the same effect is the language of Shaw, C. J., in the case of *Thayer v. Boston*, 19 Pick. 511 [31 Am. Dec. 157]. He says, "The court are of opinion that this argument, if pressed to all its consequences, and made the foundation of an inflexible, practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court in the case of *The Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 81. There, as here, it was contended that the act was unauthorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says: "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature as well as the law of corporations, within the last half-century, has been in a progress of development, so that it has grown up from a few rules and maxims into a code. In the days of Blackstone, the whole subject of corporations and the laws affecting them were discussed within the compass of a few pages; now volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with and in a great degree influence all the business transactions of this country, and give tone and character to some extent to society itself. We do not complain of this; but we say, that as new relations from this cause are formed and new interests created, legal principles of a practical rather than of a technical or theoretical character must be applied.

And so in the course of this progress it has been. It was said by Lord Coke, "that corporations had neither souls nor bodies;" and by somebody else, "that they had no moral sense;" and from thence, or for some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs nor be liable for torts, with a few exceptions, as we shall see.

Had Lord Coke lived in this age and country, he would have seen that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs; that they act, not only upon pecuniary concerns, but, as having conscience and motives, to an almost unlimited extent they are intrusted with the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers regarding the real nature, power, and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it can not be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures for malfeasance, and even to the loss of corpo-

rate life by the revocation of their charters. And now it seems to be generally admitted that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence: *Yarborough v. Bank of England*, 16 East, 6; *Beach v. Fulton Bank*, 7 Cow. 485; *Foster v. Essex Bank*, 17 Mass. 503 [9 Am. Dec. 168]; *Riddle v. Proprietors*, 7 Id. 187 [5 Am. Dec. 85]; *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & R. 16 [8 Am. Dec. 675]; *Goodloe v. Cincinnati*, 4 Ohio, 500, 514; *Rhodes v. Cincinnati*, 10 Id. 159; *Dater v. Troy Turnpike Co.*, 2 Hill (N. Y.), 630; *Second Precinct in Rehoboth v. Catholic Congregation*, 23 Pick. 139; 2 Bla. Com. 476; Angell & Ames on Corp. 392; 2 Kent's Com. 290; 1 Swift's Dig. 75; *McCombs v. Akron*, 15 Ohio, 476; *Akron v. McComb*, 18 Id. 229. And indeed, no actions are now more frequent in our courts than such as are brought against corporations for torts, either in case or trespass: *Hooker v. New Haven etc. Can. Co.*, 14 Conn. 146 [36 Am. Dec. 477], and the cases there cited, and many others since reported. In a late case in England it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation: *Eastern Counties Railway Co. v. Broom*, 2 Eng. L. & Eq. 406. And it was decided long ago that a corporation was liable to an action for a false return to a writ of *mandamus*, alleged to have been made falsely and maliciously: *Yarborough v. Bank of England*, 16 East, 8; 14 Eng. Com. L. 159 [miscited]; *Bridge v. Grand Junction R. R.*, 3 Mee. & W. 244; Angell & Ames on Corp., c. 10, sec. 9.

In all the cases wherein it has been holden that corporations may be subjected to civil liabilities for torts, the acts charged as such have been the acts of their constituted authorities, either the directors, or agents, or servants employed by them. We do not intend here to discuss or decide the frequently suggested question, how far or when a principal, whether an individual person or a corporation, becomes responsible for the willful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not admit that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of as vexatious was instituted by the bank, in the name of the bank, and, as should be presumed, in just the same way, and by the same agencies and means, as all other suits by these institutions are commenced

and prosecuted, and nothing appears here showing any different procedure than is usual in actions by corporations. The action was brought for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank in its corporate capacity. The bank, by its charter and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive is, that if this suit was originated by the misconduct of directors or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it: Angell & Ames on Corp., c. 10, sec. 9. No act of agency appears here which does not appear in all suits brought by corporations, and nothing to show that any individuals are or ought to be made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine that principals are not responsible for the willful misconduct of their agents, as seems to have been sanctioned in the cases of *McManus v. Crickett*, 1 East, 106; *Wright v. Wilcox*, 19 Wend. 343 [32 Am. Dec. 507]; *Vanderbilt v. Richmond T. Co.*, 2 N. Y. 470 [51 Am. Dec. 315]; but denied by Chief Justice Reeve, in his *Domestic Relations*, 357—we think has never been applied to such a case as this, but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority—persons whose duty it is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation—the representatives, standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of *Burrill v. The Nahant Bank*, 2 Met. 163 [35 Am. Dec. 895], Shaw, C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says: “We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform as to be regarded as a part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. We think they do not exercise a dele-

gated authority, in the sense to which the rule applies to agents and attorneys," etc. The same principle is very distinctly recognized in the cases of *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 502; *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31. It has been said that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act—and this is only in the choice of directors, and no more. Beyond this, they can only be considered, as the persons for whose ultimate individual interests the corporation acts. The directors derive all their power and authority from the charter and laws, and none from the stockholders.

But the fear is expressed that by thus considering and treating the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent be true; but the protection of the law in this matter is not to be confined to stockholders; the public and strangers have rights also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of two innocent persons or classes is to suffer, which should it be—that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much that, as a corporation, it can not be made responsible for torts committed by its directors, as that it can not be subjected for that species of tort which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it can not act from malice, and therefore can not commence and prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation can not have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting and effecting thereby results of the greatest importance every day. And if they can have any motive, they can have a bad one—they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank, in the usual modes of its action, and still to

claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, How can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution, as a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases of a similar nature against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say in this, as in all other cases, that if the plaintiff can not in some legitimate way prove the malice he has alleged, he can not recover; but we have no right to assume it as a legal principle that it can not be proved. We do not know that it has ever been adjudged that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges is evidence of malice, and which must, as in this case, be proved. But would it be endured, that an association incorporated for the purpose suggested could with impunity assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy except by a resort to insolvent and irresponsible type-setters, and for no better reason than that a corporation is only an ideal something, of which malice or intention can not be predicated? And if, as we have suggested, the directors are, for all practical purposes, the corporation itself, acting at least as its representatives, we can see no greater difficulty in proving their motives good or bad than in thus proving the motives of other associated or conspiring bodies. We are sure that this objection of the defendants was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation felt, when the case of *Merrills v. The Tariff Manufacturing Co.*, 10 Conn. 384 [27 Am. Dec. 682], was tried at the circuit, and discussed and decided by this court. That was an action against a corporation for a malicious injury, and the sole question in this court was, whether by reason of the malicious intent the company was liable for aggravated or vindictive damages; and it was

holden to be thus liable in a very elaborate opinion drawn up and strongly expressed by Huntington, J.

The interests of the community and the policy of the law demand that corporations should be divested of every feature of a fictitious character, which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion that the nonsuit granted by the superior court should be set aside, and a new trial granted.

In this opinion WAITE, J., concurred.

ELLSWORTH, J., delivered a dissenting opinion, which was concurred in by HINMAN, J.

STORRS, J., having tried the cause in the court below, was disqualified.

Nonsuit set aside, and new trial granted.

CORPORATIONS ARE LIABLE TO ACTIONS OF TORT: See *Meares v. Commissioners of Wilmington*, 49 Am. Dec. 412. The actual active perpetration of a wrong to the rights or property of another can not find protection under the charter of incorporation any more than in the command or authority of a natural superior: *Salmon v. Richardson*, 30 Conn. 374.

THE PRINCIPAL CASE IS CITED in *Occum Co. v. Sprague Mfg. Co.*, 34 Conn. 541, to the point that members of a corporation can do no act unless expressly or impliedly authorized by their charter.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

SOUTHERN LIFE INSURANCE AND TRUST COMPANY v.
LANIER.

[5 FLORIDA, 110.]

MATTERS DEMORS BILL SHOWING WANT OF INTEREST IN COMPLAINANT can not be set up by way of demurrer, but must be raised by plea.

WHERE PARTY IS IMPROPERLY MADE CO-PLAINTIFF WITHOUT HIS PRIVITY or consent, the proper course is to move that his name be stricken out, not that the bill be dismissed even as to him.

DEMURRER ON GROUND OF MISJOINDER OF PARTY PLAINTIFF must be presented *in limine*, and if not so presented, the right to demur will be deemed waived.

ONE WHO RECEIVES BANK BILLS AND GIVES HIS NOTE THEREFOR payable in money can not set up as a defense to an action on such note that the amount borrowed was not specie or its equivalent.

WHERE CHARTER OF BANKING CORPORATION REQUIRED SUBSCRIBERS TO ITS STOCK to pay at the time of the subscription, to commissioners appointed to open books for that purpose, ten per cent on each share subscribed, directing that as soon as the stock was taken and the ten per cent paid in, trustees should be elected and the company be fully organized; and an amendatory act, passed after the organization of the company, authorized it to allow any stockholder to surrender his certificate of stock and take a certificate of full stock equal to the amount of payment made on his original stock, and empowered the company to reissue the stock surrendered: *Held*, that the company was not bound to require the purchasers of such surrendered stock to pay the ten per cent on the shares purchased by them; that the requirements of the original charter had exclusive reference to those who subscribed before the company was organized; that the powers of the commissioners ceased as soon as the stock was subscribed and the ten per cent was paid in; and that the company, and not the commissioners, had the power to reissue the surrendered stock.

WHERE CHARTER OF BANK AUTHORIZES IT TO REISSUE SURRENDERED STOCK and invest the proceeds in bonds and mortgages, it may sell such stock directly for bonds and mortgages.

WHERE GRANT OF POWER TO CORPORATION IS CLEARLY DEFINED, and no mode is prescribed for its exercise, the corporation may adopt such mode as in its judgment will secure the purpose contemplated.

PARTY WHO RELIES ON FRAUD AS GROUND FOR INVALIDATING CONTRACT must upon the discovery of the fraud take immediate steps to rescind the contract. If he repeatedly ratifies the acts of which he complains, he will be forever estopped from setting up such a defense.

PARTY CAN NOT BE ALLOWED TO AVOID HIS CONTRACT WITH CORPORATION, and thereby diminish a fund designed as a security for the benefit of the public, on the pretense that there was some abuse of the corporate powers or mismanagement on the part of the board of directors in making the contract.

SECURITY TAKEN BY CORPORATION MAY BE ENFORCED against him who gave it, although the transaction may be culpable on the part of the directors of the corporation, and a ground of forfeiture in a question between it and the government which created it.

OFFICERS OF INSOLVENT CORPORATION ARE TRUSTEES for its creditors.

APPEAL from a decree of the circuit court of Gadsden county. The court below decreed that the bond and mortgage referred to in the opinion were unauthorized by and in violation of the charter of the company, and therefore null and void, and that the notes did not constitute a lien on the property mortgaged so as to entitle the complainant to a decree of foreclosure, and that the bill be dismissed. The other facts are stated in the opinion.

James T. Archer and W. G. M. Davis, for the appellant.

Charles H. Du Pont and M. A. Long, for the appellee.

By Court, SEMMES, J. This was a suit in chancery, commenced in the name of the Southern Life Insurance and Trust Company and the state of Florida, against A. H. Lanier.

The preliminary question made in argument, and raised by the answer of respondent, is that the state of Florida has no interest in the suit, and that therefore the bill should be dismissed. The objection is presented by special matter, set up in the answer by way of demurrer, under the provisions of our statute law: Thomp. Dig., sec. 9, p. 458.

We do not doubt the correctness of the doctrine, or its application to this case, that to sustain the character of a plaintiff, it is requisite to show in him an interest, either legal or equitable, in the subject-matter of the suit. The principal facts stated in the bill, and relied on in support of the interest of the state, are that by

reason of certain liabilities incurred by the late territory of Florida for this company, under the authority of its charter, the bond and mortgage of respondent were deposited with the governor of the territory to indemnify it against loss; and that upon the filing of the bill the said bond and mortgage (which had been previously turned over to the governor of the state) was held by him in trust, and as a security for the ultimate payment and redemption of the liabilities of said territory; and that the suit was brought at the instance of said governor for and in behalf of said state. It is a misconception of the term to say that these allegations, or any of them, are inferences of law. They are stated and relied on as matters of fact, and are all admitted by the demurrer to be true.

Whether the state of Florida has in any mode or form incurred any liability in respect to this matter is not a question for our consideration; nor do we so decide, or even intimate an opinion. In fact, as far as concerns the question before us, it is not necessary that there should have existed the remotest liability on the part of the state to authorize its being made a party to the suit; for if upon the organization of the state government this bond and mortgage were delivered to the executive, and he as such held them in trust as a security and means of indemnity for another party, it was both proper and necessary that the state should have been made a complainant. It would seem scarcely necessary to refer to the manifest distinction between the case before us and the cases of the *King of Spain v. Machado*, 4 Russ. 225, *Cuff v. Platell*, Id. 242, and other authorities to the same effect. In these cases the entire want of interest on the part of some of the complainants appeared on the face of the bill, and the demurrer was of course sustained by the court. In the case of *Makepeace v. Haythorne*, Id. 244, the objection did not appear on the face of the bill, but was raised by plea. In these cases the court, in affirmation of the well-settled doctrine on this subject, say that if a party has no interest in the suit the bill is demurrable if that fact appears on the bill; but if the fact does not appear on the bill, but is brought forward by plea, it is a good defense to the suit. The principles announced by the court in these authorities are directly adverse to the argument of respondent's counsel.

But independent of these views, a fatal objection to this demurrer is that it is a speaking one: 1 Story's Eq. Pl. 495. It alleges in aid of itself that the territory of Florida in the first instance was not liable on its guaranty; that the state is not the

successor of the territory as to any liabilities incurred by the latter; that the bond and mortgage were not assigned to the state as a security; and that the governor had no authority to institute suit without the authority of the general assembly, who alone had power to enter into agreements recognizing the liability of the state; and that the late territory, through its legislature, has, by repeated action, declared said guaranties null and void. All these facts may undoubtedly be true, but it was not the office of the demurrer to set them up in its support. The very attempt to do so is fatal to the demurrer. Being matters *dehors* the bill, they could only be raised by plea in order to be available. But the argument of counsel in support of his demurrer proves too much; for if it be true, as the answer states, that the state was made a party without due authority, then the rule of practice is of peculiar application, that where a person is made a co-plaintiff improperly, without his privity or consent, the proper motion is that his name be stricken out, not that the bill be dismissed even as to him.

The respondent has at this stage of the case no cause of complaint. Our statute, which allows a defendant to set up special matter in his answer, and claim the same benefit he would be entitled to if he had demurred to the bill, is but an affirmance of the rule of chancery practice as recognized by the English courts; and the construction given by those courts to this rule is, that only at the hearing of the cause such benefit can be insisted on, except in the case of multifariousness or misjoinder, in which case, if the defendant does not take the objection *in limine*, the court, considering the mischief as already incurred, will not, except in a special case, allow it to prevail at the hearing: 2 Daniell's Ch. Pr., Am. ed., 819, and authorities cited.

If the respondent, as was his duty, had presented this point *in limine*, the objection might have been corrected without prejudice to the rights of the company. Omitting to do so, and going into the merits of the case, he waived his demurrer; for it would be against every rule of propriety to allow a defendant to call upon a court for a decree on the merits, and if against him to fall back upon his demurrer and invoke the judgment of the court upon that. And to this extent does the argument of counsel lead us. Its effect would be to mislead opposing counsel and embarrass the court in the discharge of its duty. We feel no hesitancy in saying that a defendant should never be allowed, by such a device, to spring upon his adversary in the appellate tribunal an objection he did not urge in the court

below, but by his course induced both the judge and counsel to suppose he had waived the objection. We know of no rule of chancery practice which would authorize such a proceeding, and we feel no disposition to establish one.

We now proceed to the consideration of the merits of this suit; and in view of the magnitude of the interest at stake, and with an anxious desire of settling correctly the principles involved, we have bestowed all the time at the disposal of the court to the consideration of the subject, aided, as we have been, by the very able and elaborate investigation made by counsel.

The bank was organized and went into operation in 1835. In 1839 the company reissued stock, which had been surrendered, under the provisions of the amendatory act of 1838, and the respondent Lanier became the purchaser of one hundred shares, for the payment of which he executed his bond and mortgage to secure the sum of ten thousand dollars. Some short time thereafter, in right of his being a stockholder, and upon the faith of his shares of stock, he borrowed from the bank the several sums of six thousand dollars and nine hundred and seventeen dollars, for which he gave his notes. The bill is brought to foreclose the mortgage and recover the amounts due on the bond and notes.

Upon the part of the respondent, it is contended that the bond and mortgage were given without consideration, and that they are illegal and void: 1. Because the surrendered stock was issued by the company contrary to the mode prescribed by the charter; 2. The capital stock of the bank could not be sold for bonds and mortgages; and 3. The respondent was induced to execute and deliver to the company his bond and mortgage by the fraudulent representations of its agent.

No defense is urged against the payment of the notes for six thousand nine hundred and seventeen dollars, further than that the amount borrowed was not specie or its equivalent, but bills of the bank, which it is alleged were at a discount.

The last point does not require consideration, for whether the fact be as stated or not, it can not affect the liability of Lanier, or the validity of the contract. There was nothing illegal about the transaction. It was a voluntary act upon his part to receive bank bills and execute his notes payable in money.

To sustain the first position, it is insisted that the commissioner, and not the company, should have issued the surrendered stock, and that ten per cent was requisite to be paid on each share at the time of purchase to make valid the transfer of stock.

We find nothing in the charter, nor are we aware of any rule of construction, which would warrant such a conclusion.

First, as to the ten per cent: The capital stock of the bank consisted of two millions of dollars. The commissioners were directed in the first instance to open books to receive subscriptions to this stock, and it was required that ten per cent should be paid to the commissioners on each share at the time of subscribing. So soon as all the capital stock was taken, and two hundred thousand dollars was paid in, trustees were to be elected, the governor to be notified of the fact, and upon his proclamation the company became fully organized and was authorized to commence business. All this it is conceded was done. Upon the payment of two hundred thousand dollars, which was the first installment of the capital stock, the sole object of requiring the ten per cent was fully accomplished, and the company became at once invested with all the acts and powers secured to it by the act of incorporation.

With the view of aiding all subscribers, and relieving them from the penalty of a forfeiture of their stock imposed by the tenth section of the original act, the legislature in 1838, by an amendment of the charter, authorized the company in its discretion to allow any stockholder to surrender his certificate of capital stock, and take a certificate of full stock equal to the amount of payment on the stock so surrendered, and the company were to hold or reissue such overplus stock. Upon what reason or authority can it be contended that the company were compelled to require of the purchasers of this surrendered stock a payment of ten dollars on each share of their purchase? It is not pretended that there is any provision in the act authorizing a surrender and reissue which requires it. But it is said the terms of the original charter are broad and comprehensive, including all subscribers. This is true; but still it has exclusive reference to the subscribers before the corporation was organized, and before it had existence. The ten per cent was required to be paid as a condition precedent to its existence, and it was paid by all the subscribers in literal compliance with the charter. There was no discretion in the commissioners, who were but the agents of the government clothed with a special trust. Their duty was imperative and well defined, and no subscription could be valid without this prerequisite. So soon as the two hundred thousand dollars was paid in, the duties of the commissioners in reference to the original subscribers ceased, and the special requirements of this part of the charter had been accomplished. The

object and reason of the rule ceasing, why revive it, and force its application to the exercise of unrestricted authority in the company's reissuing its surrendered stock, when, too, the ten per cent had been paid upon this identical stock by the original subscribers before the surrender, and which was in the vaults of the bank?

The question presented on this branch of the case is not a new one. In the leading case of *Jenkins v. The Union Turnpike Co.*, 1 Cai. Cas. 86, Chancellor Lansing places the doctrine, in our opinion, upon the true ground—that the power of the commissioners was restricted to a certain mode of receiving subscriptions. The acts to be performed by them were preparatory to the creation of the corporation. They had no discretion or latitude of action, and to give effect to their acts in receiving subscriptions and exacting payments the mode prescribed must be strictly pursued; otherwise, there would be no contract with the subscribers, because there was no corporation to deliver the stock, and consequently no consideration. But when the corporation was in existence, the directors might dispense with the exaction of the first payment. The same well-founded distinction between subscription for stock to commissioners, preparatory to the organization of the corporation, and to a corporation *in esse*, is fully recognized by all the New York decisions: *Vide Goshen etc. T. Co. v. Hurin*, 9 Johns. 218 [6 Am. Dec. 273]; *Highland T. Co. v. McKean*, 10 Id. 154 [6 Am. Dec. 324]; *Duchess Cotton Mfg. Co. v. Davis*, 14 Id. 238 [7 Am. Dec. 459]. See also *Lewis v. Robertson*, 13 Smed. & M. 558; *King v. Elliott*, 5 Id. 428. Even this principle, in many cases, has been considered too rigid in its application, and it has been modified by the decisions of other states. In fact, there would seem to exist no good reason for holding a contract for subscription to stock to be illegal because the payment in cash of the first installment was not exacted unless a cash capital was requisite, as in the case of a banking institution, or where by the terms of the charter it is made a condition precedent: See *Vt. Central R. R. Co. v. Claves*, 21 Vt. 31; *Selma & T. R. R. v. Rountree*, 7 Ala. 670; *Henry v. Vermillion & A. R. R. Co.*, 17 Ohio, 190; *Chester Glass Co. v. Dewy*, 16 Mass. 94 [8 Am. Dec. 128]; *Minor v. Mechanics' Bank of A.*, 1 Pet. 46. The effect of these authorities is sought to be evaded in the argument by contending that this institution was not authorized to do a banking business until the amendatory act of 1838. If this were true, it would in no aspect of the case affect the merits of the question

we are considering. The fourth section of the act authorizes the company to use two fifths of the capital stock paid in, or which may thereafter be paid in, for ordinary banking purposes. It was an additional grant to the company, not impairing or restricting its previous powers, and it was optionary on the part of the directors to use two fifths of the capital at that time paid in, for banking purposes, without calling in any further installments for that purpose, or not avail itself of the right at all, but continue in the full exercise of its original powers, in investing its capital stock in bonds and mortgages. But it is not true that this corporation had not banking powers previous to the act of 1838. By the nineteenth section of the original act it had the right to issue bills to the amount of the capital actually paid in. It had the additional right of receiving funds on deposit, and to discount and purchase promissory notes and bills of exchange. These powers constitute all the elements of banking, as understood in this country: See the case of the *Bank of Augusta v. Earle*, 13 Pet. 519.

It is further insisted that the commissioners, and not the company, should have reissued the surrendered stock. A conclusive answer to this is, that in the case of subscription to stock in the first instance, and in the case of forfeited stock, the commissioners were required to open books for subscription—in the first case by express terms, and in the latter by implication—while in the case of surrendered stock, the corporation itself was authorized “to hold or reissue it.” The grant of power to the company to accept the surrender and reissue the stock is as well defined and unrestricted as language can make it; and unless it can be shown that the commissioners and the body corporate are one and the same, there is no foundation for the argument. The question is not, as is supposed, whether there is in fact any distinction in the stock itself when forfeited or surrendered, but whether the charter has not expressly defined the grant by providing that the commissioners shall offer the one for subscription, and the company reissue the other.

If it be true that the forfeited stock could only be subscribed for through the commissioners, it was a wise provision of the act of 1838 which gave to the company this right of reissuing its surrendered stock, and it was doubtless designed to remedy the evil of the old law by providing against any contingency which might prevent the commissioners from being present at all times to open books for subscription. By the ninth section of the original charter, three persons, by name, were appointed

commissioners. After they had performed the duty assigned them, preparatory to the company's being organized, who were to act for them in case of their death or absence? No provision is made for supplying their place or appointing new ones. Was it in the contemplation of the legislature that these three persons should, under all the changes of life, be present at all times to dispose of the surrendered stock, during the fifty years' existence of the corporation? Or does not the new law, in providing a remedy, fully meet the mischief?

The next objection taken by the respondent is that the surrendered stock could not be sold for bonds and mortgages; and a similar course of reasoning is adopted to sustain this position as the first, but it is equally artificial and untenable.

By the sixth section of the original act, the corporation was required to loan its entire capital of two millions upon bonds and mortgages. One of the leading objects contemplated by the law was to invest the proceeds of the sale of stock in this kind of security; a fund permanent and secure, yielding interest, and to which the creditors of the bank could look as a security for the ultimate payment of its liabilities. Not only the two hundred thousand dollars paid in was to be invested in these securities, but all subsequent installments, so that if any money was paid for stock, it was to be at once converted into bonds and mortgages. After the bank was in esse, it was an unmeaning and idle ceremony to require payments in cash, and then invest the latter in bonds and mortgages. In the absence of all positive inhibition by the law, what objection could be raised to investing the stock in the first instance in this security? The same purpose is effected by one instead of a double operation, and no sensible distinction between them can be conceived. But it is said "that it is not the stock which is to be invested in bonds and mortgages, but the capital." But where exists the distinction? The stock represents the capital, whether in money or bonds and mortgages. The stockholder's certificate of stock is evidence of the interest he has in the capital, and nothing more. Whatever amount he has contributed to the general fund, whether in money or bonds and mortgages, his interest in the capital is the same. In investing the stock, you invest the capital of the bank.

No mode is pointed out as to reissuing this surrendered stock. But it belonged to the company, and they could dispose of it in any mode not inconsistent with their general powers. They could sell it at public or private sale, for cash or on a credit.

They had as much power as to its disposition as though it had been hypothecated to the company, and been forfeited by the terms of the hypothecation.

It is evident that if the construction given to the act of 1838 is to prevail, then, by some process unknown to us, the entire provisions of the old law became incorporated in the new. For the same rule of construction that would apply one provision must apply all, and the same mode and formalities are to be observed in reissuing the surrendered stock as before the organization of the company. The board of commissioners are to be revived if they are in life; if not, the stock is to remain fruitless and dead upon the hands of the company. The ten per cent is to be paid and the residue is to be sold, not on a credit for bonds and mortgages, but to remain payable in installments in such amounts and at such times as the trustees may direct. Thus, instead of conferring on the company an additional franchise, and amending the old law, as it purported to do, it but re-enacted (and all by intendment) its entire provisions.

There is a manifest difference between the original subscribers and the purchasers of the reissued stock. The former could surrender their shares and take a certificate for full stock. The latter could not, even with the assent of the directors, have discharged their liability by a surrender, for it would have been a fraud upon the creditors. Nor could the bank have compelled a forfeiture of their stock. Independent of this, in what possible mode were the dividends to be made to the stockholders? The first class hold certificates for full stock, the whole amount paid, while the purchasers of the reissued stock are to pay but ten per cent on their purchase. Are the latter entitled to the same dividends as the former? Or are two distinct classes of stockholders to exist in the same company with distinct rights and privileges, depending upon no fixed rule, but subject to constant change and modification, by the amount of installments which each may pay on his stock?

The two acts are entirely independent of and inconsistent with each other, and no rule of construction can reconcile them. The first is a restriction as to the mode and manner of disposing of stock, with the object and purpose clearly defined; the latter is an unconditional grant of power only restrained by the general object and policy of the law. The principle can not be questioned, that where a grant of power is clearly defined, and no mode is prescribed for its exercise, it is for the corporation to adopt such mode as in its judgment will secure the purpose con-

templated. And so well recognized is this doctrine, that as a general rule a grant specifying the mode and manner of exercising powers is construed as merely directory, unless there are negative words excluding the right to adopt any other mode; and restrictions upon grants of power designed for the protection of creditors are not to be construed to defeat that purpose. The charter of this bank, by the twenty-sixth section, is to receive from the courts "a favorable construction;" but so far from the one given it being consistent with the object of its creation, it defeats both the reason and the spirit of its provisions by embarrassing the corporation in the exercise of clear and well-defined powers.

But it is said the respondent was induced to become a stockholder by reason of the fraudulent representations of the bank or its agent; and numerous familiar elementary principles as to fraud and illegality have been invoked and zealously pressed upon the court. But their application to this case is entirely misconceived. The matter of fraud in the first instance is a mere question of fact, and we have in vain searched the record before us for evidence to sustain it. It is said the bank was insolvent in 1839, when Lanier purchased his stock. The proof is, that though embarrassed it was solvent in 1840, and paying specie; and that this embarrassment and final insolvency were mainly occasioned by the want of good faith upon the part of the stockholders to meet their liabilities. And if Lanier has failed to realize all the advantages which he seems to have expected on becoming a stockholder, it should be recollected that he has contributed to produce the very state of things of which he now complains. The loose conjectures of witnesses as to the condition of the bank in 1839, based upon no knowledge of their own, but derived from others who had as little means of information, could have but little weight under any circumstances, but especially when contradicted by the then officers of the institution. There is no evidence that the agent ever made to the respondent any representations as to the solvency of the bank, or as to any other matter upon which he rests the question of fraud. But conceding the fact to be as alleged, it was his duty, upon a discovery of the fraud, to have taken immediate steps for the rescission of his contract: Story's Eq. Jur., secs. 190-193, 195.

According to his own statement, he first discovered the alleged fraud when he applied to the bank for the loan of the six thousand nine hundred and seventeen dollars on the pledge of his stock, which he received in bills of the bank, and, for

ought that is known, used as money. Afterwards we find him renewing his notes for this amount, from time to time, without objection and without complaint; holding himself out as a *bona fide* stockholder from 1839 until the filing of his answer to this bill; giving faith and credit to the institution as such stockholder, and enjoying all the advantages of such a relation. Were the facts true, his defense has no foundation in law or morals. By his repeated ratification of the acts of which he complains, and to which he was a willing party, he is forever estopped from setting up such a defense, especially when the assets of the bank would thereby be diminished and the rights of creditors sacrificed. The means devised by the law to protect the public against loss can not be invoked to consummate the evil it was designed to avoid, by releasing him from a contract, the fruits of which he has already enjoyed.

There is one other matter to which, in our opinion, undue importance has been given, yet in consequence of its having contributed mainly to a difference of opinion among the members of the court, we feel bound to notice. It is said the fifth section of the amendatory act of 1838, which provides that the company may call in the residue of its capital stock at any time within the period of five years from January, 1839, restrains, by implication, the power of the company from reissuing any of its surrendered stock after that time; that, as a consequence, the company, in the sale of the surrendered stock, had no authority to extend the time of payment beyond that period; and that the credit given to Lanier for five years from July, 1839, was in violation of the charter, and the contract of sale and purchase therefore void. By what process of reasoning all this is arrived at, we are at a loss to conceive. Were the premises true, it would be no difficult matter to show, from principle and authority, that the extension of time did not affect the validity of the sale, and that it does not lie in the mouth of Lanier, for this cause, to avoid his contract, which, as between him and the company, was founded upon a good and sufficient consideration. But the positions assumed are not warranted by any fair construction of the charter, and can not be sustained.

If reference is had to the twelfth section of the original act of incorporation, and the amendatory acts of 1836 and 1837, in connection with the fifth section of the act of 1838, it is evident that the latter, in authorizing the company to "call in the residue of its capital stock," has exclusive reference to the stock originally subscribed for, and the payments for which were due

and then outstanding. To make the whole charter consistent with itself, these several sections, treating of the same subject-matter, should be construed in reference to each other. By the twelfth section of the original act, the subscribers to stock were required to pay ten per cent in cash on each share; ten per cent at the expiration of six months thereafter, and the "whole amount remaining due" was liable to be called in by the trustees at any time within three years from the date of subscription. The shares of every stockholder omitting to make such payment within the time prescribed became forfeited, together with all previous payments made thereon. The amendatory acts of the two following years authorized the company to extend these payments—the second installment from six months to three years, and the residue from three to five years from the time of subscribing. This gave the stockholders until some time in 1840 to pay up the remaining installments then due. The act of 1838 authorized the company to extend a further indulgence of five years from January, 1839. It provides for the calling in, at any time within a limited period, the residue of its capital stock—that is, the amount then remaining due, and which represented the capital stock subscribed for. All the capital stock of the bank had been taken, and the installments liable, as we have seen, to be called in at any time by the trustees, but who could in their discretion postpone the payment to the time designated by the act of 1838. How is it possible to extend the provisions of this act to stock which, after the passage of the law, might be surrendered to and reissued by the company under a new grant of power? The reissued stock is not subscribed for as was required in the sale of stock in the first instance. The latter was payable in installments, at the pleasure of the trustees, and subject at any moment to forfeiture. But upon the company's accepting a surrender of stock, under the act of 1838, it could hold or reissue it in any mode it deemed proper, consistent with the leading objects of the charter. The sale of this stock to Lanier, for his bond and mortgage, was not subject to the payment of installments, to be called in at the pleasure of the company, but it was absolute and unconditional. The contract of sale and purchase was complete, the purchaser holding a full and perfect title to the stock, subject to no recall, no forfeiture or conditions.

It must result from the argument, which assumes that the contract of sale was illegal because the credit given to Lanier was more than five years from January, 1839, that had the credit been

within five years it would have been legal. Suppose it to have been so, and that Lanier on purchasing his shares had paid in cash the ten per cent, and given his bond and mortgage for the residue, payable in four years. Could the company have recalled in this stock, or in other words, have enforced the payment of this bond, which represented the stock, before its maturity? If the argument be true, the company could under this fifth section exercise its unquestionable power of calling in the stock at any time within five years, by enforcing payment of the bond at any moment after it was executed. The very absurdity to which the argument leads us is a sufficient answer to its soundness.

Again: suppose this surrendered stock had been sold to Lanier for cash, and immediately the company had loaned the same to him on his bond and mortgage for five years or less time—these securities still represented the identical stock held by Lanier, and the position of the parties would in legal contemplation be altogether the same as now. Could the bank call in this stock before the maturity of the bond? Why not, if it has the power claimed for it under the fifth section? Is its power become suddenly paralyzed by simply entering into a contract which it is conceded would be a legitimate and legal one under the provisions of its charter? The entire argument is necessarily based upon the hypothesis that although the bank has ample power to dispose of its surrendered stock, yet under the same law which clothes it with this power it can make no contract for its sale which it can not enforce at any time within five years from January, 1839—thus by one sweeping construction denying to the company the right of investing its capital stock in bonds and mortgages, a right hitherto unquestioned in the company, and made by its charter one of the great and leading objects of the institution.

At the passage of the act of 1838, the first installment upon all the shares, amounting to two hundred thousand dollars, had been paid in. Now, if the stockholders choose to avoid a forfeiture by availing themselves, as they doubtless would do, of the privilege of surrendering their unpaid stock, then the effect of the construction given to this act is to throw upon the company all of this surrendered stock, without the power to reissue it for bonds and mortgages, and thus reduce the capital of the bank from two millions to two hundred thousand dollars, when by the very terms of the charter the company had the power of increasing it to four millions.

If Lanier is to be considered a subscriber to stock from July,

1839, the time of his purchase, then the company were authorized, under the original and amendatory acts of 1836 and 1837, to give him a credit of five years from the date of his subscription. But if the act of 1838 applies to the reissued stock, then, in the case of Lanier and all others who might purchase stock after January, 1839, the provisions of the act, instead of being, as is conceded, an extension of the time of payment before allowed, would be a limitation; and thus by the rule of interpretation adopted, the fifth section would extend the time of payment to the first subscribers, and without any words to that effect limit it to others who it is contended could only become stockholders by subscribing in the same mode and under the same rules and restrictions as originally provided. It is a strange rule of construction that would thus construe an express grant which, while on its face it extended the power of a corporation, was to be considered as a restriction on its original powers. And it is something new in the history of corporations that this institution, then in prosperous circumstances, with a charter containing most extraordinary grants of power, should be represented but three years after its organization as a suppliant before the legislature, praying that its privileges be curtailed, and that the power under which it could exercise its corporate franchises for the term of fifty years should be limited to five years from January, 1839.

The construction which is sought to be given to this act is at variance with both the letter and spirit of the charter, and would lead to endless embarrassment and difficulty. The fifth section of the act, it is manifest, has reference exclusively to contracts then subsisting, and can not apply to future contracts in relation to the sale of surrendered stock. The third section of the same act contains a new grant to the corporation, well defined as to power and unrestricted as to time—a power which the company could legitimately exercise in the sale of its stock as often as it was surrendered, and within the duration of its charter.

The substance of the entire defense made in this case is based upon the alleged misconduct on the part of the directors of this institution. To say that a party can avoid his contract, and thereby diminish the fund which was designed as a security for the benefit of the public, upon the pretense that there was some abuse of the corporate powers, or mismanagement on the part of the board of directors in making the contract, is to pervert the well-settled principles of law, and, under color of its sanc-

tion, to open the door for the consummation of fraud upon individuals and the public. Neither party can escape the obligation created by the sale and purchase of this stock. Admitting the contract to have been made contrary to the letter of the charter, it is not thereby void, and the respondent can not avail himself of any merely unlawful act by himself and the directors, whether only designed or fully consummated, to perpetrate a greater fraud on the creditors of the bank: See *Centre etc. & T. Co. v. McConaby*, 16 Serg. & R. 144.

In the case of the *Bank of South Carolina v. Hammond*, 1 Rich. L. 288, the defense was, that the contract was in violation of the charter, and void. The court held that a contract with a corporation may be binding on the parties, though it was an abuse of the corporate powers, and for which the corporation was answerable to the government which created it; and that it was too strict to insist that a power which is contained in a general grant, and which in various forms may be pertinent to the purpose of a corporation, may be restricted to a particular form of direction for its exercise. The same defense was relied on in the case of *Little v. O'Brian*, 9 Mass. 423, and the court say, whether for this violation of the charter, the government may not seize their franchises, upon due process, is a question not now before us. It is sufficient to say it does not lie in the mouth of a stockholder for this cause to avoid his contract, which, as between him and the company, was made upon a sufficient consideration. In the case of *Fleckner v. Bank of United States*, 8 Wheat. 338, the court say that the defense set up was merely a violation of the charter, for which a remedy may be applied by the government, and conceding the bank to have violated its charter in this particular transaction, it is not easy to perceive how that objection could be available. The act did not say that such a transaction or contract was *ipso facto* void. It remained to be shown how, if the bank had a general right to discount notes, a contract not made void by the act itself could on that account be avoided by the party. See also *Chester Glass Co. v. Dewy*, 16 Mass. 94 [8 Am. Dec. 128].

These authorities are based upon this general principle, that all acts of incorporation are held to be directory unless they expressly avoid all security taken other than that prescribed, and that although the transaction may be culpable on the part of the directors, and ground of forfeiture, in a question between the government and corporation, yet the security taken may be enforced against him who gave it: Angell & Ames on Corp. 190;

Palmer v. Lawrence, 3 Sandf. 162; *Brouwer v. Appleby*, 1 Id. 158.

It is conceded that this institution is insolvent, and it can not be disputed that when a corporation becomes insolvent the officers are trustees for creditors, and the same principles of law which would be applicable to a suit in favor of creditors would apply in all their force to the case before us.

For the reasons contained in this opinion, we are compelled to reverse the opinion of the court below, and the complainant is entitled to a decree of foreclosure, with costs, and for the amount of principal and interest due upon the bond and mortgage.

ANDERSON, C. J., delivered a dissenting opinion.

LIABILITIES OF DIRECTORS OF CORPORATIONS: See *Hodges v. New England Screw Co.*, 53 Am. Dec. 624, note 637, where this subject is discussed at length; *Godbold v. Branch Bank at Mobile*, 46 Id. 211.

OBJECTION FOR WANT OF PROPER PARTIES TO BILL IN EQUITY, when and how made: See *Hightower v. Thornton*, 52 Am. Dec. 412, note 427, where other cases are collected.

FRAUD IN CONTRACT AS GROUND FOR RESCISSION: See *McCorkle v. Doby*, 47 Am. Dec. 560, note 563; *Masson v. Bove*, 43 Id. 651, note 654, where numerous other cases are collected.

LAW OF BANK BILLS: See note to *New Hope D. B. Co. v. Perry*, 52 Am. Dec. 447 et seq.

THE PRINCIPAL CASE IS CITED in *State Board of Agriculture v. Citizens' Street Railway Co.*, 47 Ind. 413, and in *Pancoast v. Travelers' Ins. Co.*, 79 Id. 178, to the point that although there be a defect of power in a corporation to make a contract, yet if the contract made by it is not in violation of its charter or of law, and the corporation has by its promise induced a party relying on it to expend money and perform his part of the contract, the corporation will be held liable thereon.

DOGGETT v. HART.

[5 FLORIDA, 215.]

WHERE PARTY CAN FIND IN COURT OF LAW FULL AND ADEQUATE REMEDY, a court of equity does not open its door to him.

CESTUI QUE TRUST MAY MAINTAIN EJECTMENT upon a demise in his own name, though the legal estate be still in the trustee, in a case where the purposes of the deed have been satisfied, and also in the case of a resulting trust.

WHERE CESTUI QUE TRUST BRINGS EJECTMENT, JURY IS PERMITTED TO PRESUME that a regular surrender has been made by the trustee of his estate, thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action: 1. Where the purposes of the trust estate have been satisfied; 2. Where the beneficial occupation of the

estate by the possessor induces a supposition that a conveyance of the legal estate has been made to the party beneficially interested; 3. Where the trust is so plain that a court of equity would not hesitate to compel the trustee to make a conveyance to the *cestui que trust*.

CESTUI QUE TRUST COMING INTO COURT OF EQUITY TO ASSERT LEGAL TITLE must allege that the trustee has refused the use of his name in an action at law.

COURT OF EQUITY DOES NOT ENTERTAIN JURISDICTION FOR PURPOSE OF PREVENTING MULTIPLICITY OF SUITS merely because the complainant has a multitude of suits depending upon the same question. This species of jurisdiction is consequential rather than original, and is exercised chiefly in regard to matters springing out of subjects belonging appropriately to the jurisdiction of a court of equity.

COURT OF EQUITY WILL NOT ENTERTAIN JURISDICTION IN CASES OF CON FUSION OF BOUNDARIES, simply because the boundaries are in contro- versy, unless there is some equity superinduced by the acts of the parties, such as fraud, gross negligence, omission, or misconduct.

APPEAL from a decree of the circuit court for Duval county. The facts are stated in the opinion.

Philip Fraser and Felix Livingston, for the appellant.

G. W. Call, for appellee Hart.

McQueen McIntosh, for the other appellees.

By Court, **ANDERSON, C. J.** This is an appeal from the cir- cuit court for Duval county, sitting in chancery. The appellant filed in that court her bill against the appellees, praying that the respondents might be decreed to deliver up to her the pos- session of certain real estate lying in the town of Jacksonville, and for other relief.

We propose to consider whether the complainant applied to the proper tribunal for the recovery of her alleged rights, and the conclusion to which we shall come upon this inquiry will render unnecessary the further examination of the imputed de- fects and errors in her bill.

“Has the complainant, then,” to use the words of the de- murrer which was filed by the respondents, “by her bill made such a case as entitles her to any relief against the defendants in a court of equity?”

There are three several grounds on which the complainant rests her claim to come into a court of equity: 1. That she had no relief at law, in consequence of her interest in the lands in question being only an equitable interest; 2. That it was neces- sary to come into equity in order to avoid a multiplicity of suits; and 3. That she had a right to claim the aid of a court of equity

on account of a confusion of boundaries, which confusion involves the title to the disputed lands.

We shall consider these grounds in the order here presented, with the facts connected with them, as we find them in the record.

Mrs. Doggett's interest in the land is derived from a deed executed by I. D. Hart, one of the defendants. By this deed Hart conveyed certain lands, which it is not necessary to our present purpose to describe, to one William J. Mills, "in trust, for the exclusive use and benefit of Maria Doggett, wife of John L. Doggett, free from all or any claim or claims of said John L. Doggett, or any other person or persons claiming in or through or by him, for the sole use of the said Maria, free from all claims or demands of the said John L. Doggett." The boundaries of the land conveyed in this deed are claimed to embrace the lands sued for. The bill shows that John L. Doggett died in 1844, before the commencement of the present suit. It also charges that Mills, the trustee, has neglected and abused his trust by confederating with Hart to deprive the complainant of a large portion of the land conveyed in the deed.

The bill alleges that Hart continues to hold much of this land, and has sold other portions and received payment for the same, and other of the defendants are in possession of portions of the land. From this statement, it appears that Mrs. Doggett's title is that of a *cestui que trust* under the deed from Hart, and it is obvious that she relies chiefly upon this as her warrant for coming into equity to enforce her possessory rights. If, in her character as developed by the statements of the bill, she could go into a court of law and find there a full and adequate remedy for her alleged injuries, the door of an equity court would be closed to her. Let us inquire into her capacity to sue in a court of law.

The general rule doubtless is, that to enable a claimant to support an action of ejectment in a court of law, he must be clothed with the legal title to the lands: Adams on Ejectment, 32; but the necessity of having exceptions to these general rules, upon the principle of adaptation which is essential to their utility as instruments for administering justice, has prompted the law courts to relax this rule in regard to the class of persons to whom the complainant belongs. A *cestui que trust*, after the purposes of the deed have been satisfied, may maintain ejectment, upon a demise, in his own name, though the legal estate is still in the trustee: *Hopkins & Watson v. Ward et al.*, 6 Munf.

38. Now, in this case, the deed of trust was designed, and it is so expressed on its face, to give an absolute property to Mrs. Doggett, free from all claims or demands of her husband, John Doggett. The husband having died several years since, the purposes of the deed in vesting the legal title in a trustee have been satisfied, and the *cestui* may therefore properly sue in ejectment.

In the case of *The Town of North Hempstead v. The Town of Hempstead*, 2 Wend. 109, 134, it was adjudged by the court for the correction of errors that *cestuis que trust*, in the case of a resulting trust, may maintain or defend ejectment for the lands which constitute the trust property. Mrs. Doggett alleges in her bill that the consideration money in the trust deed was fully paid by herself; she is therefore entitled to all the benefits allowed in the case just cited to the *cestuis que trust* of a resulting trust, besides her peculiar privilege as a *cestui* of a satisfied trust.

These reasonable relaxations of the rule that a legal title can alone prevail in ejectment seem to be founded upon a presumption in the excepted cases that there has been a conveyance of the legal estate. It is upon this ground that the court in the case of *Jackson d. Smith v. Pierce*, 2 Johns. 226, puts the allowance, and we find also that this is the ground upon which Adams in his treatise on the action of ejectment places it. "To obviate," he says, "the inconvenience which may at times arise when an ejectment is brought by a *cestui que trust*, from the operation of the salutary maxim that the legal estate must prevail, as affecting his situation with his trustees, the jury will in particular cases be permitted to presume that a regular surrender has been made by the trustees of their estate, thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action. Thus a surrender will be presumed, if the purposes of the trust estate have been so satisfied; or if the beneficial occupation of the estate by the possessors induces a supposition that a conveyance of the legal estate has been made to the party beneficially interested, in whom the trust is a plain one, and a court of equity will compel the trustees to make a conveyance:" Tillinghast's Adams on Ejectment, 87.

Mrs. Doggett's case belongs to all three of the classes of cases here enumerated, as those in which the presumption of a legal title may be indulged. The trust has been satisfied, inasmuch as her husband, from whose claims and demands the trust was designed to protect the estate, is dead. She is in the beneficial

occupation of at least a portion of the estate, for in the charge of confederacy against Hart and her trustee she charges that they had conspired to deprive her of the use and benefit of a large portion of the land conveyed in trust, and the trust is so plain a one that a court of equity would not hesitate to compel the trustee to make her a conveyance, upon proof of her allegation as to the death of her husband.

Besides these general considerations, which indicate clearly that Mrs. Doggett would have been admitted into a court of law to try and establish the possessory rights claimed by her, it is further apparent upon the face of the bill that it is demurrable for her failure to allege that her trustee had refused the use of his name in an action at law. This allegation is necessary even to set up a pretense for coming into equity, to use the language of Lord Hardwicke in the case of *Motteux v. The London Assurance Co.*, 1 Atk. 545.

But it is claimed, in the second place, that the complainant had right to the aid of a court of chancery in order to avoid a multiplicity of suits. It is very clear that the jurisdiction of a court of equity can not be invoked simply on the ground that the party seeking its interposition has a multitude of suits to bring, whether they be against defendants in suits of ejectment or in other actions. If it were so, all the barriers between courts of law or equity would be broken down in favor of the litigious, and the equity courts be overwhelmed with the consideration and adjudication of matters altogether foreign to their peculiar principles and rules of jurisprudence. A merchant in extensive business might bring in all his debtors to answer to a single monster bill upon the same principle that a plaintiff in ejectment might bring his complaint into a court of equity because there was more than a single trespasser upon the premises which he sought to recover.

In the case of *Mayor of York v. Pilkington*, 1 Atk. 282, a precedent beyond which the courts have never gone, there was a bill filed to quiet the plaintiff, who was in possession in a right of fishing against a number of defendants claiming several rights. This possession, or at least the establishment of the right of possession in an action at law, appears to be an indispensable prerequisite to the interposition of a court of chancery. "The bills filed under these circumstances are bills of peace, and are designed to call upon the equity courts to extend their protection over parties who are in possession under the sanction of the courts of law." In the case last referred to, Lord Hard-

wicke says: "It is a general rule that a man shall not come into a court of equity to establish a legal right until he has tried his title at law, if he can."

So Lord Redesdale says, in Mitford's Eq. Pl. 145, 146: "In most cases it is held that the plaintiff ought to establish his right by a determination of a court of law in his favor before he files his bill in equity; and if he has not so done, and the right he claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold." The expressions which qualify the expression here used by Lord Redesdale, that this doctrine is held in most cases, do not any of them embrace the case of Mrs. Doggett, and are in fact almost exclusively confined to cases of possession where the party has had no opportunity of trying his right at law.

Mr. Justice Story, in his commentaries upon equity jurisprudence, in enumerating the various subjects of equity jurisdiction, nowhere sanctions the bringing of a suit in that court upon the naked allegation that a bill there would avoid a multiplicity of suits in a court of law. Where a suitor seeks the aid of chancery for the purposes of discovery, the court will then, having possession of the case, proceed to adjust the relative rights of the parties, in order to avoid a multiplicity of suits which might result from sending them back to a court of law.

So in cases of accounts, of agency, of apportionment, of general average, of contribution, of waste, and of partnership, where chancery once entertains a suit upon grounds legitimately cognizable in that court, it will proceed to adjudicate other matters of which it has only incidental cognizance, in order to avoid multiplicity of suits. The cases we have enumerated embrace most of those which induce a chancery court to step out of its peculiar domain to intrude upon the province of a law court to prevent oppression and expensive litigation. In these, as well as in others which we have not enumerated, it will be found that this species of jurisdiction is consequential rather than original, and is exercised chiefly in regard to matters springing out of subjects belonging appropriately to its own jurisdiction. One of the earlier chancellors (Lord Nottingham) betrays by the language in which he claims the jurisdiction, that it may be traced in some degree to the ancient jealousy between the two courts, as well as to the more becoming desire of suppressing useless litigation. "When," said his lordship, "this court can determine the matter, it shall not be a handmaid to the other courts, nor beget a suit to be ended elsewhere:" 1 Story's Eq. Jur., sec. 65.

Mrs. Doggett's case does not belong to this class, for she is not before a court of chancery for any purpose belonging properly to its jurisdiction, so as to entitle her to an incidental inquiry into her rights of possession to the land she claims, nor, for the reasons which we have already given, can her bill be considered in the nature of a bill of peace. She is therefore not entitled to the aid of a court of chancery upon this ground.

8. We will inquire thirdly, whether she is entitled to its aid because one of the subjects of concurrent jurisdiction belonging to the chancery courts arises from the confusion of the boundaries of land. We will first examine the facts as set forth in the bill upon which this alleged confusion of boundaries rests.

The defendant Hart is alleged to be rightly possessed of a grant of land on the St. John's river, known as the "Maria Taylor" grant, bounded and described as follows: "Beginning at a gum tree at the mouth of McCoy's creek, and running thence north forty chains, to a pine tree, thence east fifty chains, to a pine tree, thence south forty chains to an oak tree on the bank of the said St. John's river, and thence along the river westwardly to the place of beginning."

The deed of trust under which Mrs. Doggett claims conveys to her trustee "a certain tract of land situated in Jacksonville, and bounded as follows: On the south by St. John's river, on the north and east by Hogan's creek, and on the west by lands granted to the heirs of Purnel Taylor, and now owned by I. D. Hart, which land described as above was formerly granted by the Spanish government to John Masters." The grant thus referred to is described in the bill and exhibits as bounded on the west by the aforesaid "Maria Taylor" grant, on the north and east by Hogan's creek, and on the south by St. John's river.

It thus appears from the bill that the two tracts abut upon each other, and that the controversy is as to the locality of the coterminous boundary line. The bill alleges that Hart continued to hold possession of the disputed land after the execution of the trust deed by the connivance of the trustee.

It is to settle this boundary, and to restore to complainant the possession of the land which she alleges to be wrongfully withheld from her, that she asks the aid of a court of equity.

Treating of the subject of boundaries, Mr. Justice Story, in his commentaries, says: "Whatever may have been the origin of this branch of jurisdiction, it is one which has been watched with a good deal of jealousy by court of equity of late years;

and there seems to be no inclination to favor it, unless special grounds are laid to sustain it. The general rule now adopted is not to entertain jurisdiction in cases of confusion of boundaries, upon the ground that the boundaries are in controversy, but to require that there should be some equity superinduced by the act of the parties, such as some particular circumstances of fraud, or some confusion where one has plowed too near another, or some gross negligence, omission, or misconduct on the part of persons whose special duty it is to preserve or perpetuate the boundaries:" 1 Story's Com., sec. 615.

None of these equities belong to the case before us.

Again: "When there is an ordinary legal remedy," continues the commentator, "there is certainly no ground for the interference of courts of equity, unless some peculiar equity supervenes which a court of common law can not take notice of or protect:" 1 Story's Com., sec. 616. In this case we see no obstacle to the exercise of an ordinary legal remedy, nor do we recognize any peculiar equity which a court of common law can not protect.

Again: "The existence of a controverted boundary by no means constitutes a sufficient ground for the interposition of courts of equity. Between independent proprietors, such cases would be left to the proper redress at law:" 1 Story's Com., sec. 619. These principles are fully sustained by the case of *Wake v. Conyers*; indeed, the language of the commentator is the same with that of the Lord Keeper Henly, who decided the case: 1 Eden, 331.

In *St. Lukes v. St. Leonards*, referred to in the same book, at page 512, a bill was filed by the parish of St. Lukes to avoid confusion in making their rates, and prayed a commissioner to fix their boundaries for that purpose. Lord Thurlow refused to interfere. In a note to this case Lord Thurlow is reported to have said that if he should entertain a bill and direct an issue in such a case as this, he did not see what case would be peculiar to the courts of law. In the case of *Spear v. Crawler*, 2 Meriv. 417, Sir W. Grant, M. R., refused to issue a commission to ascertain the boundaries of manors, upon the authority of the two cases just referred to. Such has been the uniform ruling of the courts, and as there is nothing in the case before us upon which an equity can be based, we must dismiss the complainant to look for her proper remedy in a court of law.

Having thus fully considered the right of the appellant to come into a court of equity at all, and decided adversely to the

right, we find it unnecessary to discuss the matters of demurres set forth by the defendants.

The decree of the chancellor dismissing the bill must be affirmed.

WHEN CESTUI QUE TRUST CAN MAINTAIN EJECTMENT, AND WHEN TRUSTEE WILL BE PRESUMED TO HAVE CONVEYED LEGAL TITLE.—At common law, and in those states where a separate chancery jurisdiction has been established, it is a well-established rule that in ejectment the legal title must prevail. "A court of law in general recognizes only the legal owner of property, and every action that is founded on the legal title must be brought by or in the name of the trustee in whom that title is vested. Therefore, in an ejectment for the recovery of land, a demise must be laid in the name of the trustee in whom the legal estate is outstanding, or the plaintiff will fail in the action:" Hill on Trustees, 274; Tyler on Ejectment, 75; Adams on Ejectment, 4th ed., 43; *Doe v. Staples*, 2 T. R. 684; *Goodtitle v. Jones*, 7 Id. 47; *Doe v. Reade*, 8 Id. 118; *Doe v. Wroot*, 5 East, 132; *Jackson v. Pierce*, 2 Johns. 221; *Peck v. Newton*, 46 Barb. 173; *Moore v. Spellman*, 5 Denio, 225; *Smith's Lessee v. Hunt*, 42 Am. Dec. 201; *Reece v. Allen*, 48 Id. 336. In the case of *Jackson v. Pierce*, 2 Johns. 226, Thompson, J., delivering the opinion of the court, said: "It is unnecessary to examine into the defendant's equitable rights, because, sitting in a court of law, we can not enforce them should any be found to exist. It is a rule at this day well settled in England, and which has been adopted by this court in *Jackson v. Chase*, 2 Johns. 84, that no equitable title can be set up in ejectment, in opposition to the legal estate. The only way in which an equitable title can be assisted at law, is by allowing the presumption in certain cases to prevail, that there has been a conveyance of the legal estate. But where the case precludes any such presumption, the legal title is peremptory and must prevail." And so immutably fixed is this rule, that the trustee may recover in ejectment even against the *cestui que trust*: Adams on Ejectment, 4th ed., 43; 2 Wash. Real Prop., 4th ed., 520; *Doe v. Wroot*, 5 East, 132; *Doe v. Reade*, 8 T. R. 118; *Matthews v. Ward's Lessee*, 10 Gill & J. 443; *Fitzpatrick v. Fitzgerald*, 13 Gray, 400; *Pownal v. Myers*, 16 Vt. 408; *Beach v. Beach*, 39 Am. Dec. 204; *Reece v. Allen*, 48 Id. 336. Lord Kenyon, C. J., delivering the opinion of the court in *Doe v. Reade*, 8 T. R. 122, said: "With respect to the other point made in this case, the opinion I have several times given on it since I have sat here remains unshaken. I agree with what was said in *Lade v. Holcomb*, that where the beneficial occupation of an estate by the possessor has given reason to suppose that possibly there may have been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate; but if it appear in a special verdict, or a special case, that the legal estate is outstanding in another person, the party not clothed with the legal estate can not recover in a court of law; and in this respect I can not distinguish between the case of an ejectment brought by a trustee against his *cestui que trust* and an ejectment brought by any other person."

In England it was at one time held that the legal estate in the trustee could not be set up against the *cestui que trust*. This doctrine was maintained by Lord Mansfield, and seems to have been accepted, with some modifications, by Lord Kenyon. In the case of *Hart v. Knot*, 1 Cowp. 46, Lord Mansfield said: "One objection which has been taken is that the legal estate

is in the trustee, and therefore the heir at law can not recover in this ejectment. In answer to that objection, it has often been determined that an estate in trust merely for the benefit of the *cestui que trust* shall not be set up against him; anything shall rather be presumed." This doctrine was, however, several times questioned, and was finally overruled by Lord Ellenborough, C. J., in the case of *Doe v. Wroot*, 5 East, 132. In New York, too, it was said in some cases that, in the case of a resulting trust, the *cestui que trust* might maintain or defend ejectment for the trust property. In the case of *North Hempstead v. Hempstead*, 2 Wend. 134, Savage, C. J., said: "If the patentees were trustees, and the *cestuis que trust* paid the consideration, there was then a resulting trust in their favor; and *cestuis que trust* have been considered as possessing the equitable estate, and the legal also, so far as to enable them to defend or maintain an action of ejectment for lands thus held by them." In the case of *Jackson v. Leggett*, 7 Wend. 379, the same learned judge said: "The estate of the *cestui que trust* may be sold on execution, and has been so far considered the property of the *cestui que trust* as to be a defense in an action of ejectment." And in the case of *White v. Carpenter*, 2 Paige, 238, Jones, chancellor, said: "The estate itself vested in the *cestui que trust*." But in the subsequent case of *Moore v. Spellman*, 5 Denio, 225, Beardsley, C. J., who delivered the opinion of the court, said that these statements were *obiter dicta*. In that case it was decided, after a review of the prior cases, that ejectment can not be maintained by the beneficiary of a resulting trust, and that the *cestui que trust* can not defend himself in an ejectment brought by the trustee. In *Moore v. Burnet*, 11 Ohio, 334, it was decided that the legal title of a trustee, under a deed of trust, with a power to sell for the payment of the debts of the *cestui que trust*, is not divested by the discharge of the debts, but the trustee may maintain ejectment. But in the case of *Hopkins v. Ward*, 6 Munf. 38, it was held that a *cestui que trust*, after the purposes of the deed have been satisfied, may maintain ejectment upon a demise in his own name, although the legal estate is still in the trustee. This fact does not, however, deprive the trustee holding the legal title of his right to maintain ejectment, but he may maintain ejectment also, even after the trust is satisfied. In *Brown v. Doe*, 7 How. (Miss.) 181, it was decided that where one purchases land with the money of another and takes the conveyance, or has been paid the purchase money and has not conveyed, he is the trustee of a satisfied trust, and neither he nor his heir can set up the legal title in an action of ejectment against the beneficiary. And in *Reece v. Allen*, 48 Am. Dec. 336, it is held that a conveyance by a trustee under a deed of trust passes the legal title, and in ejectment the purchaser need not show that in making the sale the trustee had complied with the conditions of the trust deed.

In those states in which there is no court of equity, the courts necessarily deal with equitable interests as if they were legal estates: Tyler on Ejectment, 76; 2 Wash. on Real Prop., 4th ed., 527. Thus in Pennsylvania, a *cestui que trust* entitled to the enjoyment of the possession of land may maintain ejectment to recover it, in his own name, either against the trustee or a stranger: *Presbyterian Congregation v. Johnston*, 1 Watts & S. 9; *School Directors v. Dunkleberger*, 6 Pa. St. 29. In that state ejectment is an equitable action, and whenever chancery would execute a trust or decree a conveyance, the courts, by the instrumentality of a jury, will direct a recovery in ejectment: *Peebles v. Reading*, 8 Serg. & R. 484. And where the active duties of a trustee holding the legal title have ceased, the legal title vests in the beneficiary without a conveyance: *Westcott v. Edmunds*, 68 Pa. St. 34. In North Caro-

lina, too, under the code of that state, the equitable owner of land may maintain an action for its recovery, although the legal estate is in his trustee: *Murray v. Blackledge*, 71 N. C. 492.

WHEN RECONVEYANCE BY TRUSTEE WILL BE PRESUMED.—In some cases, where the legal title has been vested in a trustee, either in fee or for a limited time, a reconveyance of the legal estate from the trustee to the person beneficially entitled will be presumed: *Hill on Trustees*, 253; *Matthew's Presumptive Evidence*, 210; *Perry on Trusts*, sec. 349; *England v. Slade*, 4 T. R. 682; *Doe v. Sybourn*, 7 Id. 2; *Goodtitle v. Jones*, Id. 47; *Roe v. Reade*, 8 Id. 118; *Jackson v. Pierce*, 2 Johns. 221; *Moore v. Jackson*, 4 Wend. 58; *Dutch Church v. Mott*, 7 Paige, 77; *Matthews v. Ward's Lessee*, 10 Gill & J. 443; *Aikin v. Smith*, 1 Sneed, 304. And this presumption need not always be founded on a belief that the conveyance was actually made: *Perry on Trusts*, sec. 349; *Hillary v. Waller*, 12 Ves. 239.

Three circumstances are requisite to raise a presumption of a reconveyance by the trustee: 1. It must have been the duty of the trustee to convey; 2. There must be sufficient reason to justify the presumption; 3. The object of the presumption must be to support a just title: *Hill on Trustees*, 253; *Perry on Trusts*, sec. 350; *Aikin v. Smith*, 1 Sneed, 304.

1. Where a trustee is under no obligation to convey to the *cestui que trust*, the jury will not be directed to presume a conveyance: *Langley v. Sneyd*, 1 Sim. & Stu. 45; *Goodson v. Ellison*, 3 Russ. 583; *Beach v. Beach*, 39 Am. Dec. 204. But where the beneficial owner has for a long period dealt with the property as if he were possessed of the legal fee, it will be presumed that a conveyance has been executed: *Noel v. Bewley*, 3 Sim. 103. In the case of *England v. Slade*, 4 T. R. 682, a devise of real estate had been made to trustees for the testator's son, and to convey to him immediately on his attaining twenty-one. The son came of age in 1788, and in the following year made a lease of the property. In 1792 the lessee brought ejectment. There was no proof of any conveyance, but the court held that one might be presumed. Lord Kenyon, C. J., delivering the unanimous opinion of the court, said: "There is no reason why the jury should not have presumed a conveyance from the trustees to him, upon his attaining the age of twenty-one, in pursuance of their trust, according to what was said by Lord Mansfield in *Lade v. Holcomb*. It was what they were bound to do, and what a court of equity would have compelled them to have done if they refused. But it is rather to be presumed that they did do their duty. And as to the time, the jury may be directed to presume a surrender or conveyance in much less time than twenty years." Where there is an express direction in the trust instrument for a conveyance of the legal estate by the trustee at a certain time specified, the duty of the trustee to make the conveyance becomes cogent, and the presumption of his having made it will be readily entertained: *Hill on Trustees*, 255; *Hillary v. Waller*, 12 Ves. 239; *England v. Slade*, 4 T. R. 682; *Doe v. Sybourn*, 7 Id. 2; *Wilson v. Allen*, 1 Jac. & W. 611. Where the estate has been originally conveyed to trustees for some particular purpose, as soon as the purpose is served it becomes the duty of the trustees to convey, and the conveyance will be presumed to have been made: *Hill on Trustees*, 254; *Hillary v. Waller*, 12 Ves. 239; *Doe v. Sybourn*, 7 T. R. 2; *Cooke v. Soltan*, 2 Sim. & Stu. 154; *Doe v. Wright*, 2 Barn. & Ald. 710; *Bartlett v. Downes*, 3 Barn. & Cress. 616; *Emery v. Grocock*, 6 Madd. 54; *Nicoll v. Walworth*, 4 Denio, 385. A trustee ordinarily takes no greater estate than is needed to support his trust; and the extent of the legal interest the trustee takes in the estate is to be determined, not by words

of inheritance, or otherwise, but by the object and extent of the trust upon which the estate is given; and when its objects are fully accomplished, the title of the trustee ceases, and the entire title, legal and equitable, passes by operation of law to the *cestui que trust*: *Schaffer v. Lavretta*, 57 Ala. 14; *Nicoll v. Walworth*, 4 Denio, 385. Thus where property was conveyed to a trustee for the sole and separate use of a married woman, it was held that on the death of her husband the use became immediately executed in the widow: *Roberts v. Mosely*, 51 Mo. 282. But as long as the trusts are subsisting, the law will not presume a conveyance by the trustee, for that would be presuming a breach of trust, which the law never does: *Hill on Trustees*, 255; *Keen v. Deardon*, 8 East, 248; *Doe v. Staples*, 2 T. R. 684. Mere length of time, as between trustee and *cestui que trust*, affords no ground for the presumption of a conveyance from the trustee to the *cestui que trust*: *Perry on Trusts*, sec. 349; *Keen v. Deardon*, 8 East, 248; *Goodson v. Ellison*, 3 Russ. 583; *Hillary v. Waller*, 12 Ves. 239; *Doe v. Langdon*, 12 Q. B. (64 Eng. Com. L.) 719; *Flournoy v. Johnson*, 7 B. Mon. 694. But where the lapse of time, joined with other circumstances, makes it morally certain that the original purposes for which the trust estate was created have been satisfied, the court will presume a conveyance, or instruct the jury to presume it: *Hill on Trustees*, 255; *Hillary v. Waller*, 12 Ves. 239; *Emery v. Grocock*, 6 Madd. 54. In *Moore v. Jackson* it was held that after a lapse of thirty-two years a release to a *cestui que trust* by a trustee would be presumed, as against the heirs at law of the latter.

2. Circumstances must exist from which the execution of the conveyance may be reasonably presumed: *Hill on Trustees*, 256. Length of time, though not of itself sufficient ground for raising the presumption, is nevertheless an important circumstance to which much weight is attached. So continued possession by the *cestui que trust*, though not in general a sufficient reason in itself for presuming a conveyance by the trustee, because such possession is not inconsistent with the trustee's title, may, in connection with other even slight circumstances, be sufficient to justify the presumption: *Hill on Trustees*, 256; *Doe v. Langdon*, 12 Q. B. (64 Eng. Com. L.) 719; *Keen v. Deardon*, 8 East, 248; *Hillary v. Waller*, 12 Ves. 239; *Goodson v. Ellison*, 3 Russ. 583.

3. The presumption will only be made in favor of a just title, and to prevent that title from being defeated: *Hill on Trustees*, 262; *Doe v. Cooke*, 6 Bing. 174; *Tenny v. Jones*, 10 Id. 75. In the case of *Doe v. Cooke*, 6 Bing. 179, Tindal, C. J., said: "No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed."

WHERE LAW AFFORDS FULL, ADEQUATE, AND COMPLETE REMEDY, equity will not interfere against a judgment: *Garvin v. Squires*, 50 Am. Dec. 224, note 226, where other cases are collected.

MULTIPLICITY OF SUITS, WHEN EQUITY ASSUMES JURISDICTION TO PREVENT: See *Vann v. Hargett*, 32 Am. Dec. 689, note 695, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Beal v. Chase*, 81 Mich. 535, to the point that a court of equity which has once taken jurisdiction of a cause will determine all the matters involved in it.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

PERSONS v. JONES.

[12 GEORGIA, 371.]

IN ACTION TO RECOVER DAMAGES FOR SELLING PLAINTIFF NOTE VOID FOR USURY, the statute of limitations runs from the day of the sale.

CONTRACTS MADE IN VIOLATION OF STATUTE ARE INVALID.

NOTE TAINTED WITH USURY IS INVALID IN GEORGIA.

PARTY TRANSFERRING NOTE FOR VALUE WARRANTS, by implication, that it is genuine, and free from any defects which would make it worthless.

TRANSFERRER OF INVALID NOTE IS ENTITLED TO RECOVER FROM TRANSFERRER the amount paid for the same, when ignorant of its defects.

STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN IN ACTIONS OF FRAUD or deceit until the discovery had been made.

CASE. Appeal from the Columbia superior court. The facts are stated in the opinion.

E. H. Pottle, for the plaintiff.

A. J. Miller, for the defendant.

By Court, LUMPKIN, J. This was an action on the case for a deceit, founded upon the following facts: Gabriel Jones, the defendant, as administrator of Joseph Barnes, deceased, held a note given originally by one Lewis S. Persons and others to his intestate, and renewed to him after his appointment as administrator. This note was transferred to George W. Persons, the plaintiff, by delivery, in 1839. George W. Persons held the note till 1845, when suit was brought by him against the makers, in the inferior court of Monroe county. They filed the plea of usury, and verified it in terms of the statute, and the plaintiff failing to appear and testify, after the notice to do so, a verdict was rendered for the defendants, upon the facts set forth in

their plea, which the law makes evidence in their behalf. George W. Persons, several years afterwards, commenced this action against Jones, to recover back, in the way of damages, the money paid him on the note, who relies for his protection upon the statute of limitations.

The errors complained of are for the refusal of the court to charge as requested, and to the charge as given. They are threefold, and I will notice them in their order.

Counsel for the plaintiff asked the court to instruct the jury that the right of action did not accrue to the plaintiff until the rendition of the judgment against him, in the former suit, in Monroe county, against the makers of the note.

Was the party entitled to this charge? We think not. On the contrary, we are clear that the cause of action accrued instantly upon the transfer of the usurious paper; and that the plaintiff might have sued the next day, and recovered back the money paid for it. Mr. Chitty states the law to be, and such is the doctrine of all the elementary writers, that if a note is transferred for any sufficient consideration, by a party knowing it to be of no value, and the transferee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received: Ch. Bills, 9th ed. (1840), 244, 247. The note in this case was a nullity, to the extent that it was infected with usury. It was a contract made in violation of the express statute of the state; and the cause of action was consequently complete at the same moment of time that the transaction was made. Every man transferring a negotiable security warrants its collectibility, so far as its soundness—not its solvency—is concerned.

In an action on the case for a deceit, is it a sufficient answer to the statute of limitations that the plaintiff was ignorant of his cause of action until within four years next before the suit was brought? Upon this point the court below held that “cases of fraud form an implied exception to the statute, to be acted on in courts, both of law and equity, according to their respective jurisdictions.” Such had been the intimation of this court in several previous cases, and such is now its deliberate decision.

We forbear to go at length into the argument, pro and con, having done so fully in *Conyers v. Kenan*, 4 Ga. 308 [48 Am. Dec. 226]. In chancery, where the statute of limitations is pleadable, as well as at law, it is a well-settled rule that the statute is no plea to a bill charging fraud, if the bill be filed within a prescribed time after the discovery of the fraud: *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Wharton v. Lowrey*, 2

Dall. 364; 1 Dane's Dig. 625, and the authorities there cited. Why, in this state, should there be any difference between chancery and the common law in the construction and application of the statute?

The case of *Bree v. Holbech*, 2 Doug. 656, was *assumpsit* for two thousand pounds had and received. The defendant pleaded the statute of limitations. The plaintiff replied that Holbech, holding a mortgage made to his intestate, and which was found among his papers, sold it to the plaintiff, falsely affirming the mortgage to be good, when in fact there was no such mortgage—it having been a forgery by the intestate, and that the action was brought within six years from the discovery of the fraud. To this replication there was a demurrer and joinder. Lord Mansfield, in delivering the opinion of the court, says: “There may be cases which fraud will take out of the statute of limitations. But here everything alleged in the replication may be true, without any fraud on the part of the defendant. He finds a mortgage among the papers of the intestate, and parts with it *bona fide* as a marketable commodity. If he had discovered the forgery and then got rid of the deed as a true security, the case would have been very different.”

Here, then, we have a distinct recognition of the doctrine on which the plaintiff in this case relies, by Lord Mansfield; and the reasoning of the judge, and the case which he puts, applies closely and strongly to the one at bar; for this was not a legal but an actual fraud. The *scienter* is proven. Mr. Jones, after he became possessed of the note, as administrator, renewed it himself, at the same illegal rate of interest which had been charged by his intestate in his life-time.

The same principle is to be found in Esp. Dig. 151; Com. Dig., Action upon the Case in Assumpsit, H, 5; and in *Gardiner v. Cook*, Mos. 18; *Worthington v. Wilkinson*, Id. 244, 245.

In this country there is a conflict of authority upon this subject. In New York, and some of the other states, the rule has been that the statute began to run the moment the plaintiff's cause of action was perfect; and that it was immaterial whether the plaintiff's ignorance of his rights were the result of the fraudulent concealment or fraudulent representation of defendant or not: *Troup v. Smith*, 20 Johns. 33; *Oothout v. Thompson*. Id. 277; *Leonard v. Pitney*, 5 Wend. 30; *Smith v. Bishop*, 9 Vt. 110 [31 Am. Dec. 607].

In this last case, Phelps, J., in delivering the opinion of the court, insists that this is the more equitable doctrine, apart

from the express terms of the statute itself. He says, and very properly, that the object of the act is to impose a perpetual seal upon stale controversies, and prohibit their agitation, at a period when the usual means of eliciting truth are not at hand, but are removed forever; when right can not be ascertained, and justice must be administered at random; that if we make the protection of the statute to depend upon the plaintiff's knowledge of his injury, we require the defendant to perpetuate the evidence of that knowledge, during all time, and we expose him, when this and other evidence necessary for his defense shall have passed from him, to fresh litigation, with no other guide to a correct adjudication than the shreds of evidence which accident or a more subtle and sagacious adversary may have preserved.

We admit the force of these remarks.

On the other hand, in Massachusetts and other states, it is held that a fraudulent concealment by the defendant that a cause of action has accrued to the plaintiff, is a good replication to a plea of the statute of limitations. Such was the unanimous opinion of the court, in *First Massachusetts T. Co. v. Field*, 3 Mass. 201 [3 Am. Dec. 124], a case decided after a full hearing, and more in accordance with the principles of natural justice.

Parsons, C. J., commenting upon the statute of limitations, observed that it was a beneficial statute, when applied according to its true principles; but that it could not be considered as intending to protect any man in the quiet enjoyment of the fruits of a fraudulent execution of a contract, if the action be commenced within proper time after the discovery of the fraud. The delay in bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed by the defendant, the courts would violate a sound rule of law if they permitted the defendant to avail himself of his own fraud.

Sedgwick, J., expressed himself very strongly. He said he should have been very unhappy to have found that the defendants could have availed themselves of the plea of the statute of limitations. He was satisfied, upon investigation, that they could not. There was nowhere anything to be found which gave the least countenance to it. On principle, he said, there could be but one opinion. In this the moral sense of all mankind must concur.

As stated in *Conyers v. Kenan*, *supra*, this question was thoroughly discussed in *Sherwood v. Sutton*, 5 Mason, 163, and the conclusion at which Judge Story arrived was, that concealment of the fraud by the defendant was a good replication to the plea of the statute of limitations. He does not view this as an exception out of the words of the statute; but he considers the fraud as continuing during the whole period of its concealment, "thus knitting it to the original wrong;" and he states that more than a century ago the very point was submitted by the house of lords to all the judges, and that no trace can be found of any adverse opinion given by them, notwithstanding the construction which he contends for had been put upon the statute of James from the date of its enactment.

In affirming, then, the judgment of the circuit court, upon this ground, it is a consolation to know that if we err it is in company with Mansfield, and Parsons, and Story; and on the side of right.

The third and last error complained of is the ruling of the superior court, that the allegation in the defendant's plea to the first action in Monroe county, to the effect that the plaintiff had notice of the usury of the note at the time of the transfer, was evidence.

We hold that the document referred to was not admissible as testimony for any purpose, nor to any extent whatever. It was impertinent to have inserted it in the plea. It made no part of the issue. If the note was tainted with usury, the maker was entitled to be relieved, whether the defect was known to the holder or not. This statement in the answer, although inserted by the pleader, was not sworn to by the defendant. The oath appended to the plea is to the facts relative to the usury only. The plaintiff in that action had no opportunity of contradicting the statement, either by counterpleading or proof. Under these circumstances, we can not permit him to be prejudiced by this averment.

If we could find sufficient proof in the record to sustain this verdict, apart from this illegal testimony, we might not send the case back; but upon examination, it will be discovered that there is not a tittle of evidence besides this to support the finding. On the contrary, there is strong proof the other way. Lewis S. Persons himself, the defendant in the other suit, who is supposed to have made this statement in his plea, was examined as a witness, and swears that George W. Persons had no knowledge of this usury. When George W. Persons was de-

feated in Monroe, he wrote to a friend to see Gabriel Jones, and endeavored to settle the case with him, without further litigation, declaring that he had no knowledge of the usury when he traded for the note; and when this statement is communicated to Gabriel, he admits it to be true.

Upon this ground, therefore, we are compelled to reverse the judgment, and to order a new trial.

CONTRACT IN VIOLATION OF COMMON OR STATUTE LAW is void *ab initio*, and no action or suit will lie to enforce it: *Ohio L. I. & T. Co. v. M. I. & T. Co.*, 53 Am. Dec. 742.

USURY DEFINED AND DISCUSSED: See note to *Davis v. Garr*, 55 Am. Dec. 387, where the prior cases in this series are collected.

TRANSFEREE OF NOTE IS LIABLE AS GUARANTOR, WHEN: See *Camden v. McKoy*, 38 Am. Dec. 91; *Whiton v. Mears*, 45 Id. 233.

FRAUDULENT CONCEALMENT WILL NOT STOP RUNNING OF STATUTE OF LIMITATIONS, though the plaintiff is thereby prevented from knowing that his cause of action accrued: *Fee v. Fee*, 36 Am. Dec. 103. For a further discussion of this subject, see *Conyers v. Kenan*, 48 Id. 226; *Ferris v. Henderson*, 51 Id. 580; *Thrower v. Cureton*, 53 Id. 660.

THE PRINCIPAL CASE WAS APPROVED in *Baker v. Booser*, 58 Ga. 195, and *Broughton v. Winn*, 60 Id. 486.

COLLIER v. VASON.

[12 GEORGIA, 440.]

SHERIFF ADVERTISING PROPERTY, to be disposed of under execution sale, must give a full and complete description of the property to be sold, making known the name of the defendant and the person who may be in possession of the property as shall best enable the public to understand what property is to be sold.

WHAT CONSTITUTES FULL AND COMPLETE DESCRIPTION OF PROPERTY advertised at sheriff's sale is a question for the jury.

ASSUMPSIT. Appeal from Baker superior court. G. W. Collier, as deputy sheriff, levied a mortgage *fi. fa.* on certain property, describing it as "eight lots in the city of Albany, in the first district of Baker county, Nos. 14, 16, 18, and 20 on Commerce street, and 13, 15, 17, and 19 on State street, levied on as Joseph B. Shore's property," etc. The defendant, D. A. Vason, became the purchaser, and refusing to comply with the terms of sale, the sheriff advertised and resold the property at Vason's risk. This sale realized an amount considerably less than Vason's bid at the first sale; so a suit was instituted against Vason, to recover the difference. On the trial, plaintiff offered in evidence the second advertisement, describing the property as

“ eight city lots in the city of Albany, numbers not recollected, but known in said city by the name of Joseph B. Shore’s property.” Defendant objected to the introduction of the evidence, and the objection being sustained, the plaintiff excepted, and assigned error.

H. Morgan, for the plaintiff.

R. F. Lyon, for the defendant.

By Court, WARNER, J. The only ground of error assigned to the judgment of the court below is the rejection of the sheriff’s advertisement of the second sale of the property.

The second sale was made at the risk of the defendant, under our statute, who was a purchaser of the property at a former sale, and failed to comply with the terms of that sale.

By the thirty-second section of the judiciary act of 1799, the sheriff is required to advertise his sales of property levied on by execution, and to give “ a full and complete description of the property to be sold, making known the name of the defendant, and the person who may be in possession of the property:” Prince, 427. The property was levied on as the property of Joseph B. Shore, and sold as his property; the undefined interest of Joseph B. Shore in the property was not levied on and sold by the sheriff, as in the case of *Whalley v. Newson*, 10 Ga. 74.

It is unquestionably the duty of the sheriff, under the statute, to give as full and complete description of the property levied on by him to be sold, in his advertisement, as it is possible for him to do, in the exercise of ordinary diligence for that purpose, taking into view the location and condition of the property. We do not intend to say that it is absolutely necessary that the sheriff shall describe lands sold by him by the particular number in every instance, for that he may not be able always to do, after the most diligent inquiry; but if he can not ascertain the particular number, or if the lands, as in some parts of this state, are not laid off by number and district, then it will be sufficient to describe the property by its particular location, or by any prominent mark or feature which may belong to it, and by which the public may readily understand what particular property is embraced in the advertisement.

The statute contemplates that the sheriff shall give such a description of the property to be sold, in his advertisement, as shall best enable the public to understand what particular property is to be offered for sale. Lots in a city are most frequently

better known by a description of the tenements erected thereon, and the business to which the same are appropriated, than the numbers thereof. The lot on which the Oglethorpe hotel is situated in the city of Columbus would most probably be a better description of the property intended to be sold, than if the sheriff was only to state the number of the lot.

What is to be considered a full and complete description of the property advertised must always depend on the location and particular character of that property. The description of the property in the advertisement ruled out by the court below is, "eight city lots in the city of Albany, numbers not recollected, but known in said city by the name of Joseph B. Shore's property." Whether this property was as well known in the county of Baker by the description of "Joseph B. Shore's property," as it would have been if the particular numbers of the lots had been specially named, was a question of fact for the jury to have decided, under the charge of the court as to the law upon the evidence submitted. It was the duty of the court to have admitted the evidence, and then instruct the jury that the law required the sheriff to give such a full and complete description of the property in his advertisement as would best enable the public to understand what particular property was to be sold, and to have left them to have decided from the evidence whether such description had been given; inasmuch as the sufficiency or insufficiency of the description of the property must always depend upon its particular character, location, and the name by which it is best known in the community in which it is situated and in which it is offered for sale.

Let the judgment of the court below be reversed.

EXECUTION SALE—NOTICE OF SALE, WHAT IT MUST CONTAIN: See *Farr v. Sims*, 24 Am. Dec. 396; *Lowry v. Erwin*, 39 Id. 556; *Rector v. Hartt*, 41 Id. 650; *Huddleson v. Reynolds' Lessee*, 50 Id. 702, and cases cited in the notes.

THE PRINCIPAL CASE WAS CITED in *Sheffield v. Key*, 14 Ga. 528, to the effect that the notice of execution sale should contain an accurate description of the property to be disposed of. It was also cited in *Oatis v. Brown*, 59 Id. 711, to the effect that the question of what constituted a proper description in a notice of sheriff's sale was one for the jury.

PETERSON v. ORR.

[12 GEORGIA, 464.]

INJUNCTION WILL NOT ISSUE TO RESTRAIN VENDOR FROM ENTERING ON LAND, appropriating the crop, and threatening to sell the premises. PURCHASER OF LAND UNDER BOND FOR TITLE, having paid the purchase money and gone into possession, holds a legal title.

APPEAL from Randolph superior court. The facts are stated in the opinion.

Moreton and Devon, for the plaintiff.

Barry, for the defendant.

By Court, LUMPKIN, J. This was an application for an injunction, upon the following statement of facts, in the bill exhibited to the chancellor:

On the fourth of August, 1851, Margaret A. Orr sold to William T. Cooper lot No. 253 in the eighth district of Randolph county, containing two hundred and two and one half acres, and made to him a bond conditioned to execute titles the twenty-fifth day of December next ensuing, provided he paid at that time his note of four hundred dollars, given for the purchase money. On the seventeenth day of November, 1851, Cooper sold the land to Curtis Peterson, the complainant, for five hundred dollars, four hundred dollars of which was to be paid at the same time that his note fell due, and the remaining one hundred dollars twelve months thereafter. Cooper executed his bond for titles to Peterson. Cooper's note to Mrs. Orr was placed in the hands of one Daniel Morris; and Peterson's note for four hundred dollars was substituted by Cooper for his, which was duly discharged by Peterson, and he took a transfer of Mrs. Orr's bond from Cooper, so that the entire purchase money was paid to Mrs. Orr for the land; and Peterson held not only the bond of Cooper, but likewise the bond of Mrs. Orr to Cooper, to make titles, and under these he held possession of the premises.

Now, the bill alleges that having repaired the fencing, manured the land, and made a crop of cotton and other produce, besides having expended considerable labor in preparing to erect a saw-mill, Mrs. Orr forcibly entered upon the premises, appropriated the grown crop, and prevented him from carrying out his arrangements with regard to the mill, etc.; and that she is offering to sell the land, and threatens that she will do so, provided

an opportunity occurs; and the complainant invokes the powers of chancery to restrain her against these actual and menaced grievances. Is he entitled to it?

That the trespasses complained of are not of such a character as to authorize the exercise of the extraordinary preventive process of a court of equity, we are well satisfied. Our whole train of adjudications upon this subject shows this.

The only ground upon which equity would interpose would be because the legal title to the land was not in Peterson. The bill seems to have been framed and the case argued in behalf of the plaintiff in error upon this hypothesis. Whereas the contrary is most indubitably true.

The purchase money having been fully paid, and the occupancy acquired, the title was converted from an equitable into a legal title; and Peterson may resort to his action of ejectment, trespass, or any other remedy to which, as owner, he may be entitled, for the protection of his property.

And as to the threat of Mrs. Orr to sell the land, it is a mere *brutum fulmen*—a harmless thunderbolt—an ineffectual menace—mere sound, signifying nothing. She is incapable of conveying, or a purchaser from deriving a title, under the circumstances of this case, from her.

Let the judgment be affirmed.

VENDER IN POSSESSION, WHEN EQUITY WILL RELIEVE: See *Elliott v. Thompson*, 40 Am. Dec. 630; *Greenlee v. Gaines*, 48 Id. 49; *Johnson v. Evans*, 50 Id. 669; *Feemster v. May*, 53 Id. 83.

INJUNCTION, WHEN DENIED: See *Bigelow v. Hartford Bridge Co.*, 36 Am. Dec. 502; *Smith v. Pettingill*, 40 Id. 667.

THE PRINCIPAL CASE WAS CITED in *Dudley v. Bradshaw*, 29 Ga. 7, to the effect that when a party had paid the purchase money for a tract of land, and had entered into possession, he acquired a legal title to the same. See also *Scroggins v. Hoadley*, 56 Id. 165.

CLARK v. CARTER.

[12 GEORGIA, 500.]

AFFIDAVIT OF JUROR CAN NOT BE RECEIVED TO IMPEACH HIS VERDICT by showing that he misapprehended the evidence, or what were his impressions as to the effect of his finding, or that he intended something different from what he found by their verdict.

PARTY ACQUIESCING IN SUFFICIENCY OF ADMISSIONS at the trial can not move for a new trial on the ground of surprise, after verdict has been rendered.

NEW TRIAL WILL BE GRANTED upon the ground of newly discovered evidence, when it appears that the same could not be obtained previous to the rendition of the verdict, and that the same is material to the interest of the party applying.

ASSUMPSIT. Appeal from Stewart superior court. Action brought to recover amount due by defendant on a certain promissory note. The defendant pleaded a counter-claim exceeding the principal mentioned in the note. A great deal of testimony was introduced in support of the plea, but the jury rendered a verdict in favor of the plaintiff. The defendant moved for a new trial, on the ground that—1. The jury misapprehended the evidence; 2. Surprise; 3. Newly discovered evidence material to the issue; 4. That the verdict was contrary to the evidence. The defendant then submitted an affidavit regarding the newly discovered evidence, and an affidavit of one of the jurors touching upon the misapprehension of the evidence upon which the verdict was rendered. The court granted the motion and plaintiff appealed.

Clark and Wellborn, for the plaintiff.

Gaulden and Holt, for the defendant.

By Court, WARNER, J. The first ground taken for a new trial which we shall notice is that which relates to the misapprehension of the evidence by one of the jurymen on the trial of the cause.

Isaac L. Streetman, one of the special jurors who tried the cause, made an affidavit in which he states "that he returned his verdict in the case for the plaintiff, under the supposition that there had been a settlement between the parties of the accounts in defendant's plea, from the fact that the note sued on was of a younger date than the accounts in said plea, and for a smaller amount than the original notes given by Beall & Carter to Gresham, and if he had not so understood the case, he would not have returned his verdict for the plaintiff."

The affidavits of jurors can not be received to show their impressions as to the effect of their finding, or that they intended something different from what they found by their verdict: *People v. Columbia*, 1 Wend. 297. The affidavit of a jurymen can not be received to impeach his verdict: *Vaise v. Delaval*, 1 T. R. 11. The admission of such affidavits by jurymen, after they have rendered their verdict, for the purpose of setting the same aside and obtaining a new trial, would, in our judgment, be productive of an intolerable practical mischief.

The next ground taken for a new trial is, that the admissions of the plaintiff at the trial were not as full as he agreed with the defendant he would make them, and therefore he was surprised. The admissions made by the plaintiff are stated in the record, and so far as the record discloses, there was no objection made at that time that the admission of the plaintiff was not as full as he promised the defendant to make it. The defendant is too late in manifesting his surprise, after acquiescing in the sufficiency of the admission at the trial. If it was not so full as the plaintiff had promised, why did not the defendant express his surprise at that time, and ask the court for a continuance of the cause on that ground?

The motion for a new trial, however, must prevail, on the ground of newly discovered evidence. To lay the foundation for a new trial on this ground, the affidavit of Burrell K. Harrison has been filed, in which he states "that he had frequent conversations with Beall & Gresham, about the rent of the tavern, and I understood from the parties that Beall should take the tavern and furniture at five hundred dollars per annum, and that the furniture, lot, house, stables, etc., should be kept up by Beall, and the amount so expended to be deducted from the rents, and the previous furniture, etc., to be returned as found, except the actual wear and tear; after Beall had taken the tavern some time, I heard a conversation in relation to the crockery-ware, etc.; some words passed; Gresham seemed to think that there was too much carelessness among the servants. Beall inquired of Gresham where he should get the articles, and to whom they should be charged; Gresham told him he did not care where, or to whom they were charged, but to get them, and make the servants more careful." In support of the application, Carter, the defendant, has also filed his affidavit, in which he states "that at the time of the trial of the cause he was not aware of Harrison's testimony, and that it has come to his knowledge since the trial of the cause; that he was diligent in searching up testimony for the trial thereof, and that if he had known of said testimony at the time of the trial he would have had Harrison sworn as a witness in the cause." The application for the new trial in this case is within the rule prescribed by this court in *Berry v. State*, 10 Ga. 512.

Let the judgment of the court below granting the new trial, on the ground of newly discovered evidence, be affirmed.

JURORS WILL NOT BE PERMITTED TO IMPEACH THEIR VERDICT: See *Newton v. Booth*, 37 Am. Dec. 596, and cases cited in the note.

NEW TRIAL, WHEN GRANTED FOR SURPRISE: See *Riley v. City of Louisville*, 46 Am. Dec. 560; *Rogers v. Huie*, 54 Id. 300.

NEWLY DISCOVERED EVIDENCE, WHEN GROUND FOR NEW TRIAL: *Howard v. Grover*, 48 Am. Dec. 478; *State v. Carr*, 53 Id. 179.

THE PRINCIPAL CASE WAS CITED in *Young v. The State of Georgia*, 56 Ga. 403, to the point that newly discovered evidence was not a favored ground for new trial. That when affidavits were offered to that effect they should be regarded with the utmost caution. It should be known, not only who the new witness is, but where he resides, what is his character, and who are some of his associates, or the persons acquainted with him.

TUCKER v. HARRIS.

[18 GEORGIA, 1.]

PURCHASER AT ADMINISTRATOR'S SALE WHO HAS HIS DEED FIRST RECORDED will gain the same preference over an unrecorded deed as if he had bought directly from the debtor himself.

REGISTRY ACTS HAVING RETROSPECTIVE OPERATION have never been considered as falling within the constitutional inhibition against *ex post facto* laws and laws impairing the obligation of contracts.

COURT WILL PRESUME THAT ADMINISTRATOR'S BOND WAS GIVEN IN OPEN COURT, and that the applicant was duly qualified, where the order recites that he "be and he is hereby appointed," etc., and his official bond is produced and corresponds in date, amount, and every other particular with the order; the construction of such an order is that his appointment is absolute and not conditional.

NOTHING IS INTENDED IN FAVOR OF JURISDICTION OF INTERIOR COURTS; but if the jurisdiction is shown, everything will be intended in favor of the judgment.

JUDGMENTS OF COURTS OF GENERAL JURISDICTION ARE NULLITIES where the circumstances of the case make it an exception to the general jurisdiction of the court. *Per Lumpkin, J.*

COURT OF ORDINARY HAS RIGHT TO ORDER SALE OF REAL ESTATE belonging to an intestate; the act of 1816 does not limit this jurisdiction, but simply directs the mode in which it shall be exercised.

ON SALE OF LAND BY COURT OF ORDINARY, if the record shows that the application was made in proper form, and after due and legal notice, the court will presume that it was made fully and plainly to appear that the sale would be for the benefit of the heirs and creditors of the estate.

JUDGMENT OF COURT OF ORDINARY IS CONCLUSIVE and binding on every other court until reversed, and it can not be collaterally impeached, however erroneous and irregular.

RIGHTS ACQUIRED UNDER JUDGMENTS OF COURTS OF ORDINARY before they are displaced will be protected.

PROBATE COURTS CAN NOT ORDER SALE OF REAL ESTATE unless everything necessary to give them jurisdiction of the person and of the subject-matter appears upon their records.

COURT OF ORDINARY IS CLOTHED WITH GENERAL JURISDICTION over testate and intestate estates in this state.

EJECTMENT. Both parties claim title through one Howell W. Jenkins. Their claims are stated in the opinion. The plaintiff offered in evidence certain orders of the court of ordinary of Troup county; the first one appointed the administrator of the estate of Howell W. Jenkins, and reads as follows: "Upon the application of Daniel S. Robertson, and after due and legal notice, ordered that he be and is hereby appointed administrator on the estate of Howell W. Jenkins, late of this county, deceased, upon his giving bond in the sum of twenty-five thousand dollars, with John E. Morgan as his security, and that letters of administration issue to him accordingly." The second order was for the sale of the real and personal property of the deceased. The plaintiff also offered in evidence a copy of the bond, with Morgan as security, in conformity to the order, bearing the same date and amount with the order, and corresponding with it in every other particular. This evidence was all objected to, on the ground—1. That it did not appear that Robertson had complied with the order, or obtained letters, or to be entitled to them; 2. Because from the second order the object for which the property was sold did not appear; that the face of the order should have shown that the sale was for the benefit of the heirs and creditors of the estate, and that in the absence of such a statement in the order the court would not presume that it was made for that purpose; 3. Because it did not appear that Robertson had complied with the order of court by giving the bond required, and that he was sworn and qualified in open court. The court admitted the evidence, and charged the jury in favor of the plaintiff. Verdict for the plaintiff. The defendant brought error.

Tidwell and Fuller, for the plaintiff in error.

O. Warner, contra.

By Court, LUMPKIN, J. As both plaintiff and defendant claim from Howell W. Jenkins, it is unnecessary to trace the title to the land in dispute back of him. Jenkins sold the lot in his life-time to John Burke, one of the defendants in ejectment, by deed bearing date the ninth of June, 1829, but not recorded until the fifteenth day of February, 1840. After the death of Jenkins, the lot was again sold by Daniel S. Robertson, his administrator, and a deed was executed to Samuel Darden, the lessor of the plaintiff, on the seventh of August, 1838, which last deed was recorded the eighteenth of October, 1838.

Apart from other considerations, which of these conveyances

is entitled to priority, under the registry acts of this state? The act of 1837 provides that "in all cases where two or more deeds shall hereafter be executed by the same person or persons conveying the same premises to different persons, the one recorded within twelve months from the time of execution (if the feoffee have no notice of the prior deed unrecorded at the time of the execution to him or her) shall have preference." New. Dig. 175.

In *Ellis v. Smith*, 10 Geo. 253, this court held that a purchaser at sheriff's sale who has his deed first recorded will gain the same preference over an unrecorded deed as if he had bought directly from the debtor himself. The rule and the reasoning in that case apply with full force to a purchaser at an administrator's sale: See also *Waldo v. Russell*, 5 Mo. 387; *Den v. Richman*, 1 Green (13 N. J. L.), 43. The act of 1837 established no new principle upon this subject, but was declaratory only. The priority there given had been the settled doctrine of the courts of Georgia, certainly from the organization of our state government, and was probably coeval with the provincial act of 1755, requiring all conveyances of land to be recorded within a limited period, and on failure, to be deemed and construed to be void and of no effect: *Marbury and Crawford's* Dig. 111; *Harrison v. Neal*, Dudley (Ga.), 168. By the registry acts of England, as expounded by the courts of that country, grantees in a deed executed after but recorded before another conveyance of the same land, being *bona fide* purchasers without notice, are deemed to have the better title: See *Brown v. Jackson*, 3 Wheat. 449; 4 Cond. Rep. 291.

But had the rule been established for the first time by the act of 1837, giving preference to the deed first recorded, the courts would construe it to extend to conveyances made previous to its passage; as registry acts having a retrospective operation have never been considered as falling within the constitutional inhibition against *ex post facto* laws and laws impairing the obligation of contract: *Hope v. Johnson*, 2 Yerg. 125; *Vanzant v. Waddell*, Id. 260. In *Jackson v. Lamphire*, 3 Pet. 280, the court held that state legislatures had the undoubted right to pass recording acts by which the elder grantee should be postponed to a younger if the prior deed was not recorded within a limited time. Had the act of 1837 been passed to take effect *instantly*, and been made to apply to antecedent conveyances, and had not allowed a reasonable time after its enactment to record existing deeds, such an act would be unconstitutional.

But here a reasonable time was allowed. The act passed in December, 1837, and the prior deed was not made until August, 1838, nor recorded until the month of October thereafter. Up to August, 1838 (some eight months), the deed from Jenkins to Burke was not only good as between them, although executed in 1829, but was valid against all the world. For although not recorded within the time prescribed by law, still if it had been recorded before the sale by Robertson, the administrator, the first deed would have prevailed.

The other question made by the bill of exceptions is one of much more difficulty and importance.

We do not doubt the validity of Robertson's appointment as administrator. The proper construction of the order is, that it is absolute, not conditional. It is, that Robertson "be and he is hereby appointed," etc., and his official bond is produced, corresponding in date, amount, the name of the security, and every other particular, with the order. We presume that it was given in open court at the time the order was passed, and that the applicant was then and there duly qualified in terms of the law.

The difficulty arises as to the sufficiency of the second order, directing a sale of the land in controversy.

The argument in behalf of the plaintiff in error is, that the court of ordinary, being a court of limited jurisdiction, all the facts which are necessary to give it jurisdiction should affirmatively appear upon the face of its proceedings.

And we recognize the rule, that nothing is to be intended in favor of jurisdiction. But if the jurisdiction is shown, everything will be intended in favor of the judgments rendered by courts; and they must be taken to have judged right unless the contrary appears: *Sollers v. Lawrence*, Willes, 416; *The King v. Inhabitants of Chilverscoton*, 8 T. R. 181, 182.

The line of demarcation between courts of general and limited jurisdiction is not so definite, however, as is generally supposed. It is usual to state what particular courts fall within the one class, and what within the other. But what author has undertaken to mark with accuracy and precision the boundary between the two? Bacon has not, nor has Blackstone, nor any other elementary writer.

The superior courts of this state are called courts of general jurisdiction. And yet their jurisdiction is limited by the constitution. They can not try titles to land out of the county where they are situated, or a person accused of a crime out of the county where the offense was committed; nor can they in

a civil suit carry the defendant in any case out of the county of his residence, except in a few specified cases, such as joint-promisors, co-obligors, etc. Indeed, it is a well-settled principle that the judgments and decrees of courts of the most unlimited jurisdiction and of the highest rank, as well as those of a tribunal of peculiar jurisdiction, have been adjudged nullities because the circumstances of the case made it an exception to the general jurisdiction of the court: *Griffith v. Frazier*, 8 Cranch, 9; *Kane v. Paul*, 14 Pet. 39; *Elliott v. Peirsol*, 1 Id. 340; *Wilcox v. Jackson*, 13 Id. 511; *Shriver v. Kynn*, 2 How. 59; *Hickey v. Stewart*, 3 Id. 762.

The courts of ordinary in this state are not created by statute; they are constitutional courts: New Dig. 1122. They are courts of record, which the ecclesiastical courts of England are not. They are clothed with original, general, and exclusive jurisdiction (except by appeal) in the broadest terms, over testate and intestate estates: Id. 281, 283. The jurisdiction of the spiritual courts in England, in matters testamentary and of administration, is extremely limited. And such is the fact, too, in many of the states of the Union. And the limits of so much of their jurisdiction in these matters as is peculiar and exclusive are still narrower. There is scarcely any portion of the ordinary's jurisdiction in these matters in which the temporal courts of law and equity have not interfered, and exercised, directly or indirectly, a controlling power.

But in this state may be claimed for the courts of ordinary, not only all the jurisdiction which may be legitimately deduced from the common law and statutory jurisdiction of the ordinary in England, as it existed when the provincial ordinary of Georgia came into existence, but all those extensions or modifications which it has received since, from either provincial or state legislation.

Under this comprehensive grant, this court would clearly be invested with the right to order the sale of real estate belonging to an intestate. What limitation has been put upon this power by subsequent legislation? The act of 1816 makes it lawful in the ordinary to order a sale of real estate of a testator or intestate, on application of the executor or administrator, where it is made fully and plainly to appear that the same will be for the benefit of the heirs and creditors; provided, that notice of such application be made known in one of the gazettes of the state, at least four months before any rule absolute shall be passed ordering said sale: New Dig. 323.

This act does not in fact limit in the least the jurisdiction over estates already conferred on the ordinary by the constitution and laws of the state. It simply directs the mode in which it shall be exercised relative to a particular subject-matter, to wit, the disposition of the real estate of a testator or intestate. Here the subject-matter was the land of Howell W. Jenkins, deceased. The record showed that Jenkins died intestate in the county of Troup, and that he owned real and personal estate in Georgia. Under the acts of 1799 and 1810, especially, the court of ordinary of Troup county had jurisdiction over it, either to order it sold or not, according to the best of its judgment. The jurisdiction potentially existed, in the language of one of the authorities, from the death of Jenkins. It was called into exercise upon the application of the administrator. He must give notice of his intention to apply for leave to sell, and then he comes before the court and asks its judgment upon the proofs submitted. It is called on to determine whether it is satisfied that the interest of the heirs and creditors requires a sale. The record shows that the application was made in proper form, and after due and legal notice, and that a sale was in fact ordered. This judgment then stands upon the footing of all other judgments. We are bound to presume that it was made "fully and plainly to appear" to the court by the testimony adduced, that it was for the "benefit of the heirs and creditors of the estate" that license to sell should be granted.

The jurisdiction being established, all presumptions must be made in favor of what does not appear. The court having the right to decide upon the application, the purchaser is not bound to go behind the judgment of the court.

The jurisdiction may have been improvidently exercised, and in a manner not warranted by the evidence. The purchaser under the sale is not responsible for the mistakes of the court. Its decision is conclusive; its judgment, until reversed, binding in every other court. Nor can it be collaterally impeached, however erroneous and irregular: *Newell v. Newton*, 10 Pick. 470; *Hall v. Williams*, 6 Id. 232 [17 Am. Dec. 356]; *Mills v. Duryee*, 7 Cranch, 483; *Hampton v. McConnel*, 3 Wheat. 234; *Messier v. Amery*, 1 Yeates, 533 [1 Am. Dec. 316]; *Rapalje v. Emory*, 2 Dall. 54; *Hughes v. Blake*, 1 Mason, 515; *Wright v. De Klyne*, 1 Pet. C. Ct. 199; *Smith v. Lewis*, 3 Johns. 157 [3 Am. Dec. 469]; *Smith v. Sherwood*, 4 Conn. 276 [10 Am. Dec. 143]; *State ads. Wakely*, 2 Nott & M. 410; *Hess v. Heeble*, 6 Serg. & R. 57.

If the judgments of the ordinary, having jurisdiction over the subject-matter, be erroneous or irregular, like all other judgments, they may be attacked by a direct proceeding in the court where they were rendered, and set aside or corrected. Nevertheless, rights acquired under such judgments, before they are displaced, will be protected: *Voorhees v. Bank of U. S.*, 10 Pet. 475; *Barnes v. Patterson*, 6 Har. & J. 204; *Jackson v. Cadwell*, 1 Cow. 622; *Mountz v. Hodgson*, 4 Cranch, 328; *Jackson v. Bartlett*, 8 Johns. 361; *Jackson v. Rosevelt*, 13 Id. 97.

In delivering the opinion of the court in *Worthy v. Johnson*, 8 Ga. 236 [52 Am. Dec. 399], I took occasion to remark that "without intending to confound the distinction between courts of general and special jurisdiction, some of us thought that courts should give a liberal construction to statutes authorizing the sale of real estate and slaves in Georgia, by executors and administrators; that public policy required that all reasonable presumptions should be made in support of such sales, in favor of *bona fide* purchasers, especially respecting matters *in pais*; that the number of titles thus derived, and the too frequent inaccuracy of clerks and others concerned in effecting these sales, render this absolutely necessary; that if a different rule prevailed, purchasers would be timid, and estates consequently sold at a diminished value, to the prejudice of heirs and creditors."

Subsequent research and reflection, as well as the very thorough, clear, and discriminating argument submitted in this case, have convinced me thoroughly of the truthfulness of the foregoing remarks. And I trust that another legislature will not be permitted to intervene without passing an act co-extensive with the exigencies of the case, by declaring expressly that courts of ordinary are, what I now believe them to be already, under the constitution and laws of Georgia, courts of general jurisdiction as to testate and intestate estates.

Greater indulgence has of late years been shown to inferior courts; and the presumption has rather been in favor of their jurisdiction than against it.

To show this, let a few cases be cited.

By statute in Connecticut, the judges of the probate court are authorized to order a sale of the real estate of a decedent only when the debts and charges allowed by the court against the same shall exceed the personal estate: Revised Code, tit. 60, c. 1, sec. 22. In *Brown v. Lanman*, 1 Conn. 467, the validity of an administrator's title was denied, because the proceedings

did not show upon their face that the "debts and charges allowed by the court exceeded the personal estate." And it was argued that as the administrator had no power at common law to sell real estate, and the only authority he can have in any case being derived from the statute, the provision of the statute must be strictly pursued and complied with in every particular—otherwise no title is conveyed; that the statute authorizes the judge of probate to order a sale of real estate only in case the debts and charges allowed exceed the personal estate. If no debts are allowed, an order of sale is a nullity. That the court of probate being a court of limited jurisdiction, it must appear from the face of its proceedings that it had jurisdiction; and that here a fact is wanting, without which a court of probate has no more cognizance of the question of sale than a justice of the peace has. In the absence of that fact, he has no authority to interfere.

This is the argument in all its strength, delivered by counsel for the plaintiff in error in the case before us, than which no two could be more precisely parallel. But what say the supreme court of Connecticut, under laws conferring a much more restricted jurisdiction upon their probate courts than is vested in the courts of ordinary here, under the constitution and statutes of this state?

It held (stopping the attorney on the other side!) that though such proceeding might be erroneous, and set aside on appeal, yet as the court had jurisdiction of the subject-matter and there was no fraud in the case, the order of sale was valid until set aside, and could not be collaterally called in question; and Chief Justice Swift, in delivering the opinion of the court of errors, asserted that even admitting that a judgment of sale could be set aside for irregularity, it would be no ground for vacating the title of a *bona fide* purchaser under it. He moreover stated, that many instances of similar sales had occurred in that state; and that the alleged defect in the proceedings had never been deemed a ground to annul a conveyance.

I am aware that decisions have been made in that state which to some extent impugn the doctrine of *Brown v. Lanman*, *supra*. We believe, however, that the weight of argument, if not of authority, will be found, upon examination, to be in favor of the judgment rendered in that case.

This question has been repeatedly before the courts of Alabama: *Wyman v. Campbell*, 6 Port. 219 [31 Am. Dec. 677]; *Lee v. Campbell*, Id. 249; *Couch v. Campbell*, Id. 262; *Doe*

d. Duval v. McLoskey, 1 Ala. 708; *Duval v. The P. & M. Bank*, 10 Id. 636; *Perkins v. Winter*, 7 Id. 855.

By the act of that state, of December, 1822, the executor or administrator is authorized to "file a petition in the county court in which letters testamentary or of administration have been granted, setting forth that the personal estate of his testator or intestate (as the case may be) is not sufficient for the payment of the just debts of such testator or intestate, or that the real estate of such testator or intestate can not be equally, fairly, and beneficially divided among the heirs or devisees of such testator or intestate, without a sale of the real estate; setting out and particularly describing in such petition the estate proposed to be sold, and the names of the heirs or devisees of such testator or intestate; and particularly stating which are of age, and which are infants or *femes covert*." The act further directs that upon filing the petition in open court, it shall be the duty of the court to order citations to all the heirs and devisees who are of full age, and to the husbands of such as are *feme covert*, requiring them to appear on a particular day mentioned therein, at a regular or adjourned term of said court, and answer the petition; and it is made the duty of the court to appoint forthwith guardians to such of the heirs or devisees as are infants, to answer and defend against the same. And where a sale of the estate shall be ordered or decreed by the court, commissioners shall be appointed in the order or decree, with directions to sell the estate either for money or on credit, as may be most just and equitable, and to report to the court in the time limited in the order or decree. The act further provides, that upon the coming in of the report of the commissioners, the court shall render a final decree in the cause, and if the terms of the sale have been complied with by the purchaser of the estate, the commissioners shall be directed by such final decree to convey the estate sold to the purchaser.

In *Duval v. McLoskey*, 1 Ala. 708, the supreme court held that the jurisdiction of the county court, under the first section of this act, "to authorize administrators to sell land belonging to the estate of the intestate," attached as soon as the court recognized the petition of the administratrix; that the order for the sale of the real estate could not be considered invalid, because the record did not contain the petition filed by the administratrix, and that its decree for a sale could not be collaterally impeached by the omission to designate the heirs by name in the petition or elsewhere in the record, or by the direction of

the citation to the guardian instead of the heirs. That though it may not appear *in totidem verbis* from the decree of the county court that it was rendered at a regular or an adjourned term; if the contrary does not appear, it will be taken to have been rendered in conformity with the statute. And all these positions were reaffirmed in the subsequent case between *Duval v. The P. & M. Bank*, 10 Id. 636.

So, in the case before us, the jurisdiction of the court of ordinary, that is, its right to hear and determine, certainly attached, upon the application of Robertson to sell the real estate of Jenkins, which the record shows was duly made. Whether the after proceedings were regular and authorized by the proof is an immaterial inquiry. For the question we are discussing is one of jurisdiction; not whether the order of sale was voidable and could have been set aside, by a direct proceeding instituted for that purpose. Was it void? If the cases cited are law, the jurisdiction exercised by the ordinary of Troup county is clearly defensible.

The case of *Thompson v. Tolmie*, 2 Pet. 165, very fully maintains the jurisdiction of the court of ordinary of Troup county, in ordering the sale of the premises in dispute.

It was argued, amongst other distinguished counsel, by the late lamented Richard Henry Wilde, esq., a name ever dear to Georgia and to fame, a gem of the purest ray, a man of rare genius, exhibiting in happy combination the chaste, cultivated, and classic taste of Pinckney, and the brilliant and exuberant imagination of Wirt, with the sound and solid sense of Sergeant.

The proceedings which were collaterally drawn in question in that case originated in the District of Columbia, and were founded on a law of Maryland, which declares that in case the parties entitled to the intestate's estate can not agree upon a division, or in case any person entitled to any part be a minor, application may be made to the court of the county where the estate lies, and the court shall appoint and issue a commission to five discreet men, who are required to adjudge and determine whether the estate will admit of being divided without injury and loss to all the parties entitled, and to ascertain the value of the estate. And if the estate can be divided without injury and loss to the parties, the commissioners are required to make partition of the same. And if they shall determine that the estate can not be divided without loss, they shall make return to the county court, and of the reasons upon which their judgment is

formed, and also the real value of the estate. And if the judgment of the commissioners shall be confirmed by the county court, then the oldest son, child, or person entitled, if of age, shall have the election to take the whole of the estate, and pay to the others their just proportion of the value in money; and on the refusal of the oldest child the same election is given in succession to the other children or persons entitled, who are of age; and if all refuse, the estate is to be sold under the direction of the commissioners, and the purchase money divided among the several persons entitled, according to their respective titles to the estate. But if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold until the oldest arrives to age, and the profits of the estate shall be equally divided in the mean time.

Under this law it was held by the supreme court of the United States that the jurisdiction of the court over the subject-matter of the proceedings did not depend on the fact that one of the heirs was of age, but attaches when the ancestor dies intestate, and any of the persons entitled to his estate is a minor.

And Mr. Justice Thompson, in delivering the opinion of the court, says: "Every reasonable intendment is to be made in favor of the proceedings. The age of the heirs was at all events a matter of fact, upon which the court was to judge; and the law nowhere requires the court to enter on record the evidence upon which their decision is made. And how can we now say but that the court had satisfactory evidence before it that one of the heirs was of age?"

So here, whether it was for the benefit of the heirs and creditors of Howell W. Jenkins that this land should be sold, is a matter of fact upon which the court was to judge. And how can we now say that it was not made "plainly and fully" to appear that it was for the interest of the estate that the sale should be made? The law nowhere requires, in this state, the petition to be in writing or to be filed or recorded, or the evidence to be preserved, upon which the court acted. By recurring to the Alabama statute of 1822, it will be discovered that it requires that the executor or administrator "shall file" a petition in open court, as the initiatory step towards obtaining an order or decree for the sale of the real estate of their testator or intestate. And yet the court say in the case referred to in 1 Alabama, that if the county court goes on to render its decree, it can not be intended, from the absence of such a paper merely, that it was never filed; but that the intendment most rational

would be that it was lost after the rendition of the order. How much more reasonable to make such presumptions in favor of the judgments or orders of our courts of ordinary, where, as I have already stated, the petition is neither required to be in writing nor filed.

Again, in the precedent from *Peters*, where the act provided that if all the parties were minors at the death of the intestate, the estate should not be sold until the eldest arrives to age, and the principal objection raised to the title was that none of the heirs had arrived at age when the sale was made, the court say: "It is to be borne in mind that no such fact appears on the face of the proceedings." That is, instead of requiring the record to show affirmatively that one of the heirs of Robert Tolmie had arrived at age, in order to give jurisdiction to the court to order a sale, they sustain the jurisdiction which it assumed, because it did not appear negatively that none of them had arrived at age.

It is not pretended that there is any evidence in the record from Troup county that this sale was not for the benefit of the heirs and creditors. But even if there was, the judgment would stand until corrected by a direct proceeding to reverse it. And to permit the matter to be drawn in question in this collateral way, without being impugned for fraud, is not warranted certainly by any principle of law or of public policy.

Another leading case, and one which will be found, upon examination to have been suggestive of much of the learning displayed in subsequent discussions of this subject, is that of *McPherson v. Cunliff*, 11 Serg. & R. 422 [14 Am. Dec. 642]. In that case the court say: "The matter which gives the orphans' court jurisdiction is the death of the owner intestate, for if administration were taken out on the effects of a living man, or of one who died testate, the administration itself would be void, and there could be no administrator to act—no party before the court; consequently all the proceedings would be null. Where an executor obtains payment on a probate of a void will without suit, it can not be impeached, notwithstanding the probate was afterwards declared null—it being proved on the faith of the act of a judicial tribunal having competent jurisdiction: Toll. Executor, 51. The distinction in this respect is this: A probate of the will of a living person, or a letter of administration on his effects, where the person is dead, but left a will, is void *ipso facto*, because there is no jurisdiction; but where the person is dead intestate, the orphans' court have power over

his estate; and any one acting on the faith of their judicial acts will be protected." And the case of *Griffith v. Frasier*, 8 Cranch, 25, is referred to to illustrate the well-known distinction between erroneous acts or judgments of a tribunal having cognizance of the subject-matter, and of a tribunal having none such.

In order to impress on the public and professional mind the absolute necessity of protecting the title of fair purchasers under sales made by order of probate courts or courts of ordinary, Judge Duncan most truly and forcibly remarks, that if this protection be denied, you lay a train of gunpowder through the whole state, and such a decision would be the signal to set fire to it; for that nothing has been more irregular than the practice of the courts generally. These orders depend often on perishable testimony; loose scraps of paper deposited in entitled pigeon-holes, or packed up as useless lumber in old trunks or boxes; and when to this is added—and it is a sore evil—their transmission from hand to hand, as the clerks of these courts are moved off the stage in rapid succession, these and other circumstances not alluded to would render this species of title so precarious and insecure that no prudent man would buy at such sales. He declares that in some of the counties, even of that ancient commonwealth, he would not, under such rigor of decision, take fifty per cent to secure the purchasers! Nothing, he thinks, so much requires legislative attention as the proceedings in these probate courts; "for as sure as we descend into our graves, so sure into this court we must come." And in *Snyder v. Snyder*, 6 Binn. 496 [6 Am. Dec. 493], Mr. Justice Yeates, with an experience of fifty years in the business of this court, and whose knowledge of the mode of conducting it was greater than any one man living or dead possessed, exclaims, "What! shall purchasers be affected by the unskillfulness or negligence of the proper officers!"

The want of adherence to prescribed *formulae*, and to ceremonial observances and all other minor objections, must be overlooked. Presumptions should be made in favor rather than against what does not appear. A substantive compliance only should be expected or exacted.

In *Kennedy v. Wachsmuth*, decided by the supreme court at Philadelphia, Dec. 1824 (but which I do not find reported in 10 Serg. & R., the proper place for it) [12 Serg. & R. 171; 14 Am. Dec. 676], the court say: "Beyond the decree the purchaser is not bound to look. The inquiries upon ejectment are: Was there an administrator and an order to sell, such as

would authorize an administrator to make sale? Was the sale fair?" If so, the settled rule is, *De fide et officio judicis non recipitur questio*. And it is asserted that no sale in that state ever has been declared void in ejectment against a purchaser *bona fide* for any alleged irregularity in the orphans' court, or because the decree of the court was founded on mistake.

I fear, in my great zeal to sustain a rule on which the titles to so many estates depend, that I have enlarged unnecessarily, and too much incumbered this opinion by reference to authority. But in my humble judgment, a graver question has not come before this court. It is entitled to earnest consideration, both on account of its intrinsic merit as well as the zeal and ability with which it has been argued by counsel on both sides. It is now to be determined whether sales made under the orders of our ordinaries, after due notice, and upon application—improvements made—titles derived—possession taken and continued; on the faith of these orders—a constitutional court of record, having original, general, and exclusive jurisdiction, except by appeal, over testate and intestate estates—are null and void, and are to be so decreed indirectly in ejectment on original action—while these orders or judgments remain in the courts rendering them unreversed and in full force.

I am perfectly familiar with the doctrine that probate courts can not order a sale of real estate unless everything necessary to give them jurisdiction of the person and of the subject-matter appears upon their records. It is unnecessary to cite authority in support of this position. Its general correctness we do not doubt. I do insist upon it, however, that under the laws of this state, the ordinary is clothed with general jurisdiction over testate and intestate estates. And whether this constitutes them courts of general jurisdiction *quoad* estates or not, it entitles their judgments to great deference by other courts, who have not the authority, directly or *ex professo*, but only by appeal, to interfere with their proceedings. Judge Duncan, in the case upon which I have already drawn so liberally, assigns as the reason why he held the sentence or decree of the orphans' court of Pennsylvania to be conclusive was, that it is a general rule of law, that where any matter belongs to the jurisdiction of one court so peculiarly that other courts can only take cognizance of the same subject incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to it.

Moreover, I do insist upon it, that the circumstances which

attend a state in its early settlement should have much to do in modifying, or rather in relaxing, the rigid rules of law. To apply the common law of England as it existed at the time of our adopting statute, or the rules of interpretation enforced in older communities in this country, to new societies, where the legislation as well as the judicial proceedings are conducted with so little regard to exactness, would work the greatest injustice. Let an examination be made as to the state and condition of the archives of the state or of the various courts of the different counties, and what would the report disclose? "Leaves cut out, torn out, injured by damp, mutilated, in fragments, much torn, destroyed by fire, illegible, tattered, imperfect, early registers lost." Startling as the statement may be, it is nevertheless true, that the original draft of the constitution of 1798 is not to be found! Hence, it can not fail to have struck the mind of every lawyer, and even layman, who has investigated this matter, what a difference in this respect between the doctrines of the old and new states, and even between the northern and southern states—upon many subjects growing not only, and not so much out of the difference in age, as the marked difference in the manners and habits of the people. I repeat, then, that even at the present day, taking into view the fact that a large portion of this state has been but recently settled, and where we have but just commenced to require some degree of accuracy and regularity, where carelessness and negligence formerly prevailed, we must not expect nor demand the utmost regularity in the proceedings of our courts of ordinary.

Even in the Bay state, not only one of the old thirteen, but among the first-born of the sisterhood, if not the morning-star of the bright constellation of states, where the validity of a title to land sold by an administrator was contested, the court allowed proof to be offered to show that the probate office was kept in a loose and careless manner. And this testimony was held sufficient to justify the presumption, in the absence of higher proof, that the administrator had done what they adjudged to be necessary to a valid sale, namely, that he had posted up the requisite notices, and had also taken the necessary oath preceding the sale: *Gray v. Gardner*, 3 Mass. 399.

It is suggested that whatever may be the public necessity for this decision, yet that it will work great detriment to Burke, who bought of Jenkins in his life-time, and those claiming under him. Such is the inevitable result of the establishment of general principles. Partial inconvenience is the sure conse-

quence; still the production of general good outweighs the particular hardship. "Partial evil is universal good." I have long entertained the opinions here expressed. I have, I fear, explained the grounds of them with too much prolixity. Public duty required a full exposition of the reasons upon which this judgment is rendered.

After due deliberation, the result is that we think the court was correct in its judgment throughout, and that there was enough on the record to sustain fully the jurisdiction of the court of ordinary of Troup county, in ordering a sale of the real estate of Howell W. Tucker, deceased, and the validity of the plaintiff's title to the land in dispute derived under it.

Judgment affirmed.

WARNER, J., having been of counsel, did not sit.

PRESUMPTIONS IN FAVOR OF COURTS OF GENERAL JURISDICTION: See *Reynolds v. Stansbury*, 55 Am. Dec. 459, and note; *Borden v. State*, 54 Id. 217, and note; *Kenney v. Greer*, Id. 439, and note.

INFERIOR COURTS, PRESUMPTIONS AS TO JURISDICTION OF: See *Reynolds v. Stansbury*, 55 Am. Dec. 459; *Kenney v. Greer*, 54 Id. 439; *Spear v. Carter*, 47 Id. 688; *Palmer v. Oakley*, Id. 41. The language of the principal case on the point that nothing was intended in favor of their jurisdiction was quoted in *Parish v. Parish*, 32 Ga. 655.

JUDGMENT OF COURT HAVING NO JURISDICTION IS VOID: See *Lovejoy v. Albee*, 54 Am. Dec. 630, and note.

STATUTES AUTHORIZING ADMINISTRATORS TO SELL MUST BE STRICTLY COMPLIED WITH: See *Worthy v. Johnson*, 52 Am. Dec. 399, and note; *Stevenson's Heirs v. McReary*, 51 Id. 102. The principal case was cited in *Patterson v. Lemon*, 50 Ga. 236, on the distinction between the want of authority to sell rendering the sale void and a mere irregularity making the sale voidable only.

COLLATERAL ATTACK UPON SALE OF ORPHANS' COURT AFTER JURISDICTION ACQUIRED: See *Cox v. Davis*, 52 Am. Dec. 199, and note.

PROBATE COURT CAN NOT ORDER SALE UNLESS ITS JURISDICTION APPEARS UPON ITS RECORDS: *Stevenson's Heirs v. McReary*, 51 Am. Dec. 102.

PRESUMPTIONS IN FAVOR OF REGULARITY OF PROCEEDINGS ON ADMINISTRATOR'S SALE: See *Stevenson's Heirs v. McReary*, 51 Am. Dec. 102.

JUDGMENT OF PROBATE COURT CAN NOT BE COLLATERALLY ATTACKED on account of any error or defect in it: *Palmer v. Oakley*, 47 Am. Dec. 41; *Lynch v. Baxter*, 51 Id. 735; *McDade v. Burch*, 50 Id. 407, and note; *Bailey v. Dilworth*, 48 Id. 761. The subject of the conclusiveness of decrees of distribution and the power of chancery to correct or set aside settlement of accounts in probate courts is discussed in the note to *Green v. Creighton*, 48 Id. 744.

JURISDICTION OF PROBATE COURTS, WHETHER GENERAL OR SPECIAL: See note to *Worthy v. Johnson*, 52 Am. Dec. 407; *Borden v. State*, 54 Id. 217. The principal case was cited approvingly in *Brown v. Redwyne*, 16 Ga. 76, in consideration of the question of presumptions in favor of courts of ordinary; referred to on the point that courts of ordinary were not courts of limited

jurisdiction, as regarded testate and intestate estates, in *Wood v. Crawford*, 18 Id. 526; and regarded as authority for the position that the principles of the common law, as applicable to courts of special jurisdiction, should not be enforced in Georgia in their stringency in reference to courts of probate, in *Hamilton v. Moreland*, 15 Id. 346. In response to the request of Judge Lumpkin, in the principal case, the legislature passed an act making courts of ordinary courts of general jurisdiction: *Davie v. McDaniel*, 47 Id. 200.

MISCELLANEOUS CITATIONS OF PRINCIPAL CASE.—The principal case was distinguished in *Webb v. Wilcher*, 33 Ga. 569, and cited to the following points: That any judgment rendered by a court that has jurisdiction of the cause and of the parties binds the parties until set aside, notwithstanding the existence of irregularities in the proceedings previous to the judgment, if those irregularities are such as may be waived: *Bradwell v. Spencer*, 16 Ga. 580; that a grant of letters of administration by the ordinary without taking bond, though erroneous, would not make the grant void as against a *bona fide* purchaser without notice that no bond was given: *Cuyler v. Wayne*, 64 Id. 88; that rights acquired must be protected until displaced by a direct proceeding in the court where the order or judgment was rendered, correcting or setting aside such order or judgment: *Peterman v. Watkins*, 19 Id. 155; that the oldest deed has precedence over a subsequent deed, when neither is registered within twelve months of its execution, although the junior deed be first recorded: *Roe v. Maund*, 48 Id. 461.

BATTON v. WATSON.

[13 GEORGIA, 63.]

EVIDENCE IS NOT ADMISSIBLE AS PART OF RES GESTÆ, as a general rule, unless it grows out of the principal transaction, illustrates its character, and is contemporaneous with it.

TO PROVE THAT DESTRUCTION OF WILL WAS PROCURED BY UNDUE INFLUENCE, evidence showing what took place in the sick-room between the time the will was sent for and its return and destruction, and also showing the motive by which the party exerting the undue means was influenced, is admissible as part of the *res gestæ*.

IN PROVING THAT DESTRUCTION OF WILL WAS PROCURED BY UNDUE INFLUENCE, those attempting to set the will up are not obliged to rely upon the testimony of the principal actor in the supposed fraud, but may show the facts by the evidence of third persons.

IF TESTATOR WAS UNDULY INFLUENCED BY FEAR, favor, or affection, or any other cause unduly exercised, to destroy his will, and such undue influences operated as a pressure and restraint upon the deceased, under the circumstances in which he was placed at the time, so as to take away his free and voluntary mind and will, and so continued up to his death, the will will be set up.

BRYANT BATTON and Sarah H. Coalson, wife of Andrew J. Coalson, petitioned for letters of administration on the estate of Andrew J. Coalson. Watson resisted their application, on the ground that Coalson had executed a will, and had been com-

pelled to destroy it a short time before his death by the threats and undue influence of Dr. Patillo, his father-in-law. Watson introduced one Tooke, who testified that he had drawn up the will, which was duly executed, and next day Patillo sent for him, desiring him to bring the will with him; that he went to Coalson's; found Dr. Patillo and his wife there; gave the will to Coalson, at his request, who remarked that Dr. Patillo had kicked up such a fuss he would have to destroy the will, and the law would be his will; that Dr. Patillo pronounced the will to be unjust, and spoke angrily to both witness and Coalson; that Coalson destroyed the will. One Everett was also introduced to prove the undue influence. His testimony is stated in the opinion. The charge of the court appears from the opinion of the court. The jury found in favor of the proponent of the will; the applicants brought error.

Warren and Franks, and Killen, for the plaintiffs in error.

S. T. Bailey and R. P. Hall, contra.

By Court, WARNER, J. The first assignment of error in this record which we are called on to review is the admission of the evidence of Alexander Everett to the jury, as to the conversation he had with Dr. Patillo the evening the will was destroyed.

The court admitted the evidence, on the ground that it was part of the *res gestæ*, and in our judgment properly admitted it. This species of evidence is not admissible, as a general rule, unless it grows out of the principal transaction, illustrates its character, and is contemporaneous with it: *Carter v. Buchanan*, 3 Ga. 517; 1 Greenl. Ev., sec. 108. The principal transaction here is the destruction of Coalson's will by the undue influence and interference of Dr. Patillo. The will was executed on the twenty-fifth of June, and on the next day, after the will had been sent for, but before it is brought to Coalson, the witness hears loud and boisterous talking in the sick-room; recognizes the voice to be that of Patillo, but can not understand what is said. Shortly afterwards witness went into the sick-room, and Dr. Patillo invited him into the parlor, when he stated "he just had learned that Coalson had made a will, cutting off Sarah; that it was not such a will as he had expected; that he, Patillo, would not submit to it; that he would resist it at the threshold; that he would make Sarah sign away what was given to her, and would take her home, and support her as he had done; that she should not have a dime of the property, and that he had said that much to Jack. Dr. Patillo

seemed excited." This conversation was intermediate the time the will had been sent for to Tooke and its return to Coalson the same evening. When Tooke brought the will to Coalson it was destroyed by him. This evidence tends to illustrate what took place in the sick-room when the witness heard the loud and boisterous talking, and was made during the time the will was sent for and its return; therefore, a part of the transaction which finally resulted in the destruction of the will. These declarations also went to show the motive by which the party charged with having exerted the undue means to procure the destruction of the will was influenced. It was urged on the argument that Patillo was a competent witness to prove the same facts to which Everett testified. The reply is, that Dr. Patillo is the principal party charged with having procured the destruction of this will, and those who are attempting to set it up are not obliged to rely upon the testimony of the principal actor in the supposed fraud: *Bridge v. Eggleston*, 14 Mass. 249 [7 Am. Dec. 209]; *Davis v. Spooner*, 3 Pick. 287; *Allen v. Duncan*, 11 Id. 310.

There was no error in admitting the copy will to be read in evidence, on the testimony of Tooke and Shine, as to its being a substantial copy of the one destroyed.

We find no error in the charge of the court to the jury. The charge assumes the law to be, that if the testator was unduly induced by fear, favor, or affection, or any other cause unduly exercised, to destroy his will, and such undue influences operated as a pressure and restraint upon the deceased, under the circumstances in which he was placed at the time, so as to take away his free and voluntary mind and will, and so continued up to his death, then the will ought to be set up. The plaintiffs in error certainly have no just ground of complaint against this charge: for the court, in our judgment, put the case to the jury in a pretty strong point of view for them. Although the jury set up the will by their verdict, yet we think it is extremely doubtful whether the deceased did not intend after all to die intestate; but it was the exclusive province of the jury to pass upon the evidence submitted to them, and having done so, we have no legal power to interfere with their verdict, under the circumstances disclosed by the record in this case.

Let the judgment of the court below be affirmed.

ADMISSIBILITY OF EVIDENCE AS PART OF RES GESTÆ: See *Crum v. United States Mining Co.*, 56 Am. Dec. 116; *McCartney v. State*, Id. 510.

Beck v. Uthrich, 53 Id. 507; *Walter v. Gernant*, Id. 491; *Innis v. Steamer Senator*, 54 Id. 305; *Marcy v. Stone*, Id. 736.

UNDUE INFLUENCE AFFECTING VALIDITY OF WILLS: See *Terry v. Buffington*, 56 Am. Dec. 423, and note.

LOGAN v. MECHANICS' BANK.

[13 GEORGIA, 201.]

BY COMMON-LAW RULE OF PRACTICE, SEVERAL ACTIONS WILL BE CONSOLIDATED into one when the same plea may be pleaded and the same judgment given on all the counts; or when the counts are of the same nature and the same judgment may be given on them all, though the pleas may be different.

RULE AS TO CONSOLIDATING SUITS UNDER OUR PRACTICE is, that when the plaintiff institutes different suits upon separate and distinct notes or demands, which are all due, and may be joined in the same action against the same defendant, and such defendant or his counsel makes it satisfactorily appear to the court that the defense to all the notes or demands is the same, or that there is no defense to them, then the plaintiff may be compelled to consolidate them into one action; but if no such facts are made to appear to the court below, a motion to consolidate will be overruled.

MOTION to consolidate four separate actions of *assumpsit* brought by the plaintiff on four several bills of exchange at different times, and indorsed to the plaintiff. The opinion states the facts.

S. T. Bailey, for the plaintiff in error.

Gresham, contra.

By Court, WARNER, J. This was a motion to consolidate the several suits into one, which were brought by the plaintiff against the same defendants, on the ground that the several demands sued on belonged to the same plaintiff, and were all due when the first action was commenced. The court refused the motion, on the ground that it did not appear that the cause of action in each declaration was the same, of the same date, and for the same consideration.

The common-law rule of practice in Great Britain, where special pleading is allowed, undoubtedly is, that when the same plea may be pleaded and the same judgment given on all the counts, or when the counts are of the same nature, and the same judgment may be given on them all, though the pleas may be different, the several actions will be consolidated into one: 1 Ch. Pl. 196, 197. In this state special pleading is not al-

lowed in common-law cases: Prince, 442. In England a special issue might be formed on each count in the declaration, and a special verdict found thereon. Under our practice each case is carried to the jury and tried upon the petition, process, and answer, and a general verdict found upon all the counts contained in the declaration. So that, if the different causes of action might be joined under the English rule, and the defendant should have separate and distinct grounds of defense to each cause of action so joined in the same declaration, it would embarrass him very much in making that defense, under our practice. For example, the plaintiff holds four promissory notes made by the defendant for different amounts and at different times, but all due at the same time; he institutes suit thereon in one declaration; in other words, he consolidates them in one action, and the defense to one is, that it was given for a negro which was unsound. The defense to another is, that it was given for a tract of land, from the possession of which the defendant has been evicted. The defense to the third is, that it was given to compound a felony; and to the fourth, that it was given for a gaming consideration. Now, if the plaintiff is compelled to consolidate all the notes into one action, he will always do so, and the defendant will necessarily be compelled to prepare his evidence, and go to trial upon the several issues made by his several defenses. But suppose there is no defense to two of the notes sued on, is the plaintiff to be delayed until the final verdict upon the notes litigated? The rule in such cases best adapted to our circumstances and system of practice is, that when the plaintiff institutes different suits upon separate and distinct notes or demands, which are all due, and may be joined in the same action against the same defendant, and such defendant or his counsel will make it satisfactorily appear to the court that the defense to all the notes or demands is the same, or that there is no defense to them, then the plaintiff may be compelled to consolidate them into one action, for the purpose of avoiding unnecessary costs to the defendant. No such facts in regard to the defense being made to appear to the court below in this case, the motion to consolidate was properly overruled: See *Thompson v. Shepherd*, 9 Johns. 262.

Let the judgment of the court below be affirmed.

CONSOLIDATION OF ACTIONS.—“This expression applies to a mode of proceeding applicable where several actions are pending in the same court, between the same parties, and involving the same question. Under such circumstances, the court may direct that one cause only shall proceed to trial, and the others

shall follow the event of that; or in some jurisdictions, that all the actions be consolidated into one, and proceed to trial and judgment as one suit." Abbott's Law Dict., tit. Consolidation of Actions. The consolidation of actions is not a matter of right, but rests in the sound discretion of the court: *Powell v. Gray*, 1 Ala. 77; *Lewis v. Daniel*, 45 Ga. 124; *Woodward v. Frost*, 19 N. Y. Week. Dig. 125; *Burnham v. Dalling*, 13 N. J. Eq. 310; *Worthy v. Chalk*, 10 Rich. 141; *McRae v. Boast*, 3 Rand. 481; *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 Id. 645; *Blesch v. Chicago etc. R. R. Co.*, 44 Wis. 593; *Andrew v. Spear*, 4 Dill. 470; and its discretion will not be interfered with unless abused: *Lewis v. Daniel*, *supra*. In the great number of cases the motion for consolidation comes from the defendant, and a court can consolidate actions without the consent of the plaintiff: *Burnham v. Dalling*, 13 N. J. Eq. 310; but it would not consolidate without the consent of the defendant: *Groff v. Musser*, 3 Serg. & R. 262. It was held in *Amos v. Chadwick*, L. R., 4 Ch. Div., 869, that a court could consolidate only at the instance of the defendants, and not on the application of the plaintiffs; but under the New York revised statutes the application may be made by the plaintiff as well as by the defendant: *Briggs v. Gaunt*, 2 Abb. Pr. 77; S. C., 4 Duer, 664; see also *Powell v. Gray*, 1 Ala. 77. The proper mode of bringing the motion on is by a rule to show cause why the actions should not be consolidated: *McRae v. Boast*, 3 Rand. 481; *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 Id. 645; and it should be made after the declaration and before the plea: *Worthy v. Chalk*, 10 Rich. 141; although if the causes of action are admitted or certainly ascertained by affidavit, it may be made, it seems, at the return term of the writ: Id.; but the motion is made too late when not made until the trial: *Eleventh Ward Savings Bank v. Hay*, 8 Daly, 328; in *Booth v. Payne*, 1 Dowl., N. S., 348, however, where there were two actions between the same parties on different bills of exchange, the court consolidated them after issue joined and notice of trial given, upon the payment of all the costs of the second action.

It may be stated as a general rule that where several actions are brought by the same plaintiff against the same defendant on the same transaction, and where the same general defenses would be made in each, the court may on an application properly made order the actions to be consolidated: *Evans v. Smith*, 3 West Coast Rep. 213; *Howard v. Chamberlain*, 64 Ga. 684; *Tarpley v. Corputt*, 65 Id. 257; *Bentley v. Gay*, 67 Id. 667; *Crawford v. French*, 27 Tex. 436; *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 Id. 645; *Andrews v. Spear*, 4 Dill. 470; *Soloman v. Belden*, 12 Abb. N. C. 58; *Brewster v. Stewart*, 3 Wend. 441; *Cecil v. Briggess*, 2 T. R. 639. And in the following cases the actions have been consolidated: where two actions were brought upon an administration bond under the statute to recover two several claims in favor of the same plaintiff: *People v. McDonald*, 1 Cow. 189; where an attorney did different kinds of professional work for a client, and after all the business was transacted sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business before the expiration of the month in respect of the delivery of the second bill, and after the expiration of the month commenced an action for the other part: *Beardsall v. Cheatham*, 27 L. J. Q. B. 367; where plaintiff brought two actions for goods sold, one as surviving partner and the other in his individual name: *McCartney v. Hubbell*, 52 Wis. 360; where distinct actions brought by several assignees against one defendant present a complication both in the subject-matter and in the parties rarely met with: *Brown v. District of Columbia*, 17 Ct. of Cl. 303; where three distinct suits

are proceeding in favor of different parties on the same claim, two of them for the whole claim and the third for a large part thereof against the same defendant, and the trial in each case would involve an investigation into long and complicated accounts running through a series of years to the amount of hundreds of thousands of dollars: *Wilson v. Riddle*, 48 Ga. 609; and in *Prior v. Kelly*, 4 Yeates, 128, five suits on bonds were consolidated into three on obligations.

The party moving to consolidate the actions must show by affidavit that the questions to be tried are substantially the same: *Dunn v. Mason*, 7 Hill, 154; *Soloman v. Belden*, 12 Abb. N. C. 58; and that no defense is intended, or that the defenses are substantially the same: *Dunning v. Bank of Auburn*, 19 Wend. 23; *Wilkinson v. Johnson*, 4 Hill, 46. But where, on an application to consolidate a number of actions, the causes of action and the grounds of defense appear *prima facie* to be the same, it is not a sufficient answer that possibly the position of some of the parties might be different and raise different questions (especially if such questions will be only as to the amount of the respective liabilities), although the extent of the consolidation must depend upon the circumstances: *Syers v. Pickersgill*, 27 L. J. Exch. 5.

Actions upon negotiable instruments have been frequently consolidated. Thus in *Ramsey v. Wynkoop*, 1 Yeates, 5, seven suits upon protested bills of exchange were consolidated; and in *Merrihen v. Taylor*, 1 Browne, app. lxvii., three actions between the same parties on three separate promissory notes were consolidated; and so were separate suits on the same note against two joint and several promisors: *Poston v. Williams*, 8 Tex. 281; so also were separate actions brought by the same plaintiff against the same defendant, on several certificates of indebtedness for the same consideration maturing at the same time, or all due when the suits are commenced: *Lee v. Kearney Committee*, 42 N. J. L. 543. And where a party sues on a bill, and after the action is commenced another bill, accepted by the same defendant, of which he is the holder, is dishonored, and he brings a second action on that, the court will on application direct a consolidation: *Oldershaw v. Tregwell*, 3 Car. & P. 58; but generally where separate actions are brought on notes for different amounts, drawn or payable at different dates, consolidation will not be ordered: *Gaulden v. Shehee*, 24 Ga. 438; *Thompson v. Shepherd*, 9 Johns. 262; *Worley v. Glentworth*, 10 N. J. L. 241; *Bine v. Kelly*, 7 Jones L. 266; *Bank of Alexandria v. Young*, 1 Cranch C. Ct. 458; see also *Cunnack v. Gundry*, 1 Chit. 709; although the parties are the same in each, and each note was payable before any one of the suits was brought: *Bank of Alexandria v. Young*, *supra*. And where the plaintiff brings two summary processes upon two distinct notes against the same defendant, the court will not consolidate them if the amount of both notes exceeds the summary jurisdiction: *Parrot v. Green*, 1 McCord, 531; see, however, *Scott v. Brown*, 1 Nott & M. 417, note; and in *Planters' Bank v. Cowing*, 2 Id. 438, and *Rich v. Kiser*, 61 Ga. 370, a similar principle was held.

Generally where the actions are between different parties, they will not be consolidated: *Scott v. Cohen*, 1 Nott & M. 413; *Hartman v. Spiers*, 87 N. C. 28; although the same evidence was used in each: *Bones v. National Exch. Bank*, 67 Ga. 339; thus where the debts constituting the several causes of action were guaranteed by different persons, so that the question of their liabilities would be embarrassed by joining the actions, consolidation will be refused: *Potter v. Pattengille*, 8 Abb. Pr., N. S., 189; so would it be where the plaintiff had brought ten separate actions of *indebitatus assumpsit* against

ten separate defendants for certain tolls, port dues, anchorage, buoyage, and other duties alleged to be incurred by them individually as commanders of their respective vessels, although it was sworn that the actions were brought in respect of the same right, and that the trial of one would decide all: *Saltash v. Jackman*, 1 Dow. & L. 851; and where eight separate actions were brought against a steam navigation company by eight passengers for a breach of contract in supplying them with a less commodious passage than contracted for: *Westbrook v. A. R. M. S. N. Co.*, 14 C. B. 113; and where four several declarations in trespass were filed against four different persons, although there was an affidavit that the trespass, if any, was committed by all jointly: *Bayly v. Raby*, 1 Stra. 420. And suits brought upon distinct causes of action will not be consolidated: *Wallace v. Eldredge*, 27 Cal. 498; although it was held in *Wilkinson v. Johnson*, 4 Hill, 46, that it was no objection that the actions were based on different transactions, provided no defense was intended, or the questions to be tried were identical; but where several pleas are requisite, they can not be consolidated: *Saracini v. Kilner*, Comb. 244; nor can they be where the second action involves inquiry into numerous issues not embraced in the first action: *Woodward v. Frost*, 19 N. Y. Week. Dig. 125; nor where the plaintiff's different proceedings are against different funds of the defendant, to satisfy separate and distinct liens: *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 Id. 645. Nor can two several writs of *scire facias* to revive two several executions by the same plaintiff against the same defendant be: *Mickle v. Brewer*, 8 N. J. L. 85; nor cross-actions: *Harris v. Sweetland*, 48 Mich. 110. And a plaintiff may sue on all or only a part of the demands he may have against the same defendant before a justice of the peace, and he can not be compelled to consolidate his actions after he may have sued on several demands: *Barnes v. Holland*, 3 Mo. 47; nor can he be where he filed two declarations against the same defendants, one of them for right of way from one part of a close to one part of a town, and the other for another way from another part of the close to another part of the town: *Mynot v. Bridge*, 2 Stra. 1178; nor will an action of trespass against a railroad company for a trespass to land in building and maintaining its road thereon without license or condemnation be consolidated with an appeal in a proceeding by the company to condemn the land: *Blesch v. Chicago etc. R. R. Co.*, 44 Wis. 593. In *Smith v. Crabb*, 2 Stra. 1149, it was held that declarations in ejectment would not be consolidated; but such declarations were consolidated where substantially the same questions were involved, in *Jackson v. Stiles*, 5 Cow. 282; *Den v. Kimble*, 9 N. J. L. 335; but in *Reid v. Dodson*, 1 Overt. 396, where a joint action of ejectment was brought against two defendants, and docketed by the clerk as two suits, and the defendants pleaded separately, a motion for consolidation by the plaintiff was refused. Actions for partition of land situated in different counties will not be consolidated: *Mayor v. Coffin*, 90 N. Y. 312; *Mayor v. Mayor*, 64 How. Pr. 230; S. C., 11 Abb. N. C. 367; 27 Alb. L. J. 135; nor will actions for the foreclosure of mortgages: *Lockwood v. Fox*, 8 Daly, 127; and motions to consolidate tithe suits have been refused: *Foreman v. Southwood*, 8 Price, 572; *Manchester College v. Isherwood*, 2 Sim. 476.

Separate actions, one against a husband and wife for words by the wife, and the other against the husband alone for words by himself, can not be consolidated: *Swithin v. Vincent*, 2 Wils. 227. Nor can two actions for libel, one against the editor and the other against the proprietor of a newspaper, although it appear that both actions are for the same libel, the declaration in each and the pleas in each the same, and there are substantially the same

questions and defenses in each: *Cooper v. Weed*, 2 How. Pr. 40. But where the plaintiff brought at one time, and against the same defendants, a separate action in each of the counties of the state for one and the same libel, which was published in the county in which all the parties resided, the motion must be granted, and it is properly made in the county in which all the parties resided: *Percy v. Seward*, 6 Abb. Pr. 328. Three penal actions in assault, battery, and false imprisonment were ordered to be reduced into one, it appearing upon the face of the declarations that they were all for one and the same fact, in each the plaintiff declaring against one of the defendants for an assault, etc., *simul cum* the other two: *Catlin v. Elliott*, Barnes, 341. But the court refused to consolidate three penal actions for bribery by the same plaintiff against the same defendant, there being forty instances of bribery declared upon in each action: *Benton v. Praed*, 1 Smith, 423. In New Hampshire it is not the practice to consolidate actions between the same parties brought at the same term, but to so limit the costs in cases where several actions between the same parties might have been joined in one as to do justice and prevent oppression by any unnecessary accumulation of costs: *Curtis v. Baldwin*, 42 N. H. 398.

Where two suits are consolidated, they constitute thereafter but one suit, and it makes no difference that the plaintiff in one suit is the defendant in the other: *Castro v. Whitlock*, 15 Tex. 437. But the evidence in one case is not admitted into another: *Lofland v. Coward*, 12 Heisk. 546. And the consolidation will not defeat the right to dismiss as to one or more of the original causes of action: *Young v. Grand Trunk R. R.*, 9 Fed. Rep. 348. And in *Masson v. Anderson*, 3 Baxt. 290, it was held that it had no other effect than to hear the cases consolidated at the same time, that the issues remained in the pleadings as they were before, and between the same parties, and were to be determined as if the cases had been heard separately. The costs on the motion will be granted if the motion prevails: *Bank of U. S. v. Strong*, 9 Wend. 451; *Cecil v. Brigges*, 2 T. R. 639. But the court can only direct the costs of the rule to be paid by the plaintiff, and must leave the general costs to abide the results: *Bine v. Kelly*, 7 Jones L. 266.

Chancery has ordinarily no power to interfere with the rights of parties *in invitum* by an order directing the consolidation of independent suits of purely equitable cognizance: *Knight Bros. v. Ogden Bros.*, 3 Tenn. Ch. 409. And in *Forman v. Blake*, 7 Price, 654, it was held that causes in equity could not be consolidated, and Richards, chief baron, said: "I never heard of an order in the course of my experience for consolidating causes in equity; nor can I perceive upon what principle it can be done. There are many reasons why it should not; and if it be the practice, it is extraordinary." This rule has, however, been changed, and instances of the consolidation of suits in equity are numerous, and it has been held that the rules for consolidation are alike in law and equity: *Beach v. Woodyard*, 5 W. Va. 231; *Wyatt v. Thompson*, 10 Id. 645. Federal courts also may order consolidation of actions: *Desty's Federal Procedure*, sec. 921. They may make this order if the same questions substantially are involved, although there are different defendants, and even where, in consequence, the defendants will be brought into antagonism; if one of the causes of actions sounds in tort and the other in contract, separate judgments may be rendered: *Keep v. Indianapolis & St. L. R. R. Co.*, 10 Fed. Rep. 454.

BEALL v. BLAKE.

[18 GEORGIA, 217.]

MERE IRREGULARITIES IN PROCEEDINGS ARE CURED BY APPEARANCE and pleading; and objection should be made the first opportunity the party has to bring his complaint before the court, and before the party committing the error has taken any further step in the cause.

IF DEFECT TOTALLY INVALIDATES PROCEEDINGS, the defendant may at any time apply to set them aside, even though the defendant be in execution.

MERE IRREGULARITY IN PROCEEDINGS MAY BE WAIVED, but a complete defect can not be waived.

WAIVER OF PROCESS CONTEMPLATED BY ACT OF 1840 is one to be made at the commencement of the suit, and before the same is brought into court and filed with the clerk, and intends an actual waiver, and not one that is implied by appearance and pleading.

SERVICE CAN NOT RENDER PROCESS OPERATIVE which is so utterly vitiated, with or without appearance, with or without the consent of the defendant, as to be null and void.

ORIGINAL PROOF TO SUPPLY FATAL DEFECT IN PROCEEDINGS so as to retain defendant in custody under the execution upon which he has been arrested will not be allowed where the defendant moves to vacate the judgment on the ground that it appeared from the record in the case that no process had been attached to the original declaration, and where, up to the time the motion was made, no attempt was ever made to make it appear that process was attached to the original writ.

MOTION to vacate a judgment. The opinion states the case.

Whittle and Hardeman, for the plaintiff.

Rutherford and Hunter, contra.

By Court, LUMPKIN, J. The record in this case is voluminous; still the facts necessary to the decision of the points made in the bill of exceptions are few.

Nathaniel H. Beall, as executor of Rebecca Bostwick, deceased, caused Samuel R. Blake to be arrested on a *ca. sa.* purporting to have issued upon a judgment in Bibb superior court.

The defendant moved to vacate this judgment, upon the ground that it appeared from the record in the case that no process had been attached to the declaration by the clerk, and that there was no evidence thereon that the writ had ever been served by the sheriff, or that service had been acknowledged by the defendant.

It seems that while the common-law action was pending, Blake, the defendant, filed a bill enjoining the proceeding; that a verdict and decree were rendered against him on the bill, and that afterwards, to wit, in July, 1850, when Beall moved in the common-law suit the declaration was lost, and thereupon, upon the

application of the plaintiff, Beall, the court passed the following order: "It appearing to the court that the original declaration in the case has been lost, and that the within is, in substance, a true copy, it is ordered that the same be established in lieu of the original, and received and used as such, and that the cause do proceed."

The copy thus established is contained in the transcript of the record sent up to this court. It contains neither process nor service. Upon this copy a confession of judgment was entered by the Messrs. Hines, attorneys for Blake, for the plaintiff's demand, together with cost of the suit.

At July term, 1851, twelve months after the foregoing order was taken, and after judgment had been entered up against the defendant, another *ex parte* order was taken, which is in these words: "It appearing to the court, that in establishing a copy writ in the case of Nathaniel H. Beall, executor, etc., against Samuel R. Blake, it was omitted to enter a copy of the service by the sheriff, and also the process, it is now ordered that the clerk of this court do make said entries on said copy writ, *nunc pro tunc*."

After hearing argument, the circuit judge decided that the judgment on which the *ca. sa.* issued was null and void, on the ground that it did not appear from the record or papers of file that there ever was a process attached to the original declaration, or that the same had been waived by the defendant. Neither did it appear that process had yet been attached to the established copy, or waived, or that either the original or copy was ever served upon the defendant, or waived by him; and that the several orders taken to perfect the pleadings and record in said cause do not purport to give, nor do they give, authority to any one to attach process to the original declaration or to the copy established in lieu thereof.

To this judgment, as well as to the refusal of the court to permit the party at the time of the hearing to go into original proof, that process was in fact attached to the original declaration, and that the defendant was duly served by the sheriff, Beall, by his attorneys, excepted.

The act of 1799, after prescribing the manner in which process shall be sued out and returned, declares that all process issued and returned in any other manner shall be null and void: Prince, 420, 421.

Now, it is contended that this objection comes too late, and that all irregularities are cured by appearance and pleading.

We do not question this position. It is sound law: *Knox v. Summers*, 3 Cranch, 498; *Rowley v. Stoddard*, 7 Johns. 209; *Tuberville v. Long*, 3 Hen. & M. 309. But simple irregularities are not complained of in this case, but a defect, which vitiates the proceedings *in toto*. And the distinction in numerous cases by this and all other courts is, that objections or applications to set aside proceedings for irregularities should be made the first opportunity the party has to bring his complaint before the court, and before the party committing the error has taken any further step in the cause: *Downes v. Witherington*, 2 Taunt. 243; *Evans v. Rogers*, 1 Ga. 463.

But if the defect totally invalidates the proceedings, the defendant may at any time apply to set them aside, even though the defendant be in execution: Sellon's Pr., Am. ed., 101; *Hussey v. Wilson*, 5 T. R. 254; *Taylor v. Phillips*, 3 East, 155; *Kenworthy v. Peppiat*, 4 Barn. & Ald. 288; *Rogers v. Jenkins*, 1 Bos. & Pul. 383; *Stevenson v. Danvers*, 2 Id. 110; *Foott v. Coare*, Id. 589; *Harris v. Mullet*, 1 Taunt. 59; *Young v. Wilson*, 5 Id. 664; *Wickham v. Mealing*, 2 Price, 9; *Osborne v. Taylor*, 1 Chit. 400; *Anon.*, 2 Id. 237, 239.

Another distinction deserving of notice, and established by the works on pleading and practice, as well as the adjudicated cases, between a mere irregularity and a complete defect in the proceedings is, that the former may be waived by the adverse party, but not the latter.

We are clear, therefore, that the defect in this case was not cured either by the admissions of the defendant in his bill in chancery that suit was pending against him at law, or the confession of counsel for him in said suit.

Nor is the plaintiff aided, in our judgment, by the act of 1840, which declares, "that whenever a defendant to a suit in law or equity in this state acknowledges service and waives process, it shall not be necessary for the clerk to attach a process:" Cobb's New Dig. 363. The waiver contemplated by this statute is one obviously to be made at the commencement of the suit, and before the same is brought into court and filed with the clerk, and it evidently intends an actual waiver, and not that which is implied, as at common law, by appearance and pleading.

Service might be inferred from appearance and pleading, but it can not render process operative, which is so utterly vitiated, with or without appearance, with or without the consent of the defendant, as to be declared "null and void."

Now, how stands the record. so far as the attempt has been

made to cure this defect? The first order, taken at the July term, 1850, was to establish a copy of the declaration only. No mention is made whatever of the process or service. The next order, taken a year afterwards, and without notice to the defendant, directs the clerk to make these additions to the copy, as a thing which had been omitted to be done under the first order. But the record shows that no proof was offered when that order was taken, that any process ever was attached to the original declaration, or that service was perfected thereon. Nor did the order direct these deficiencies to be supplied. It simply authorized the substitution of the copy writ in lieu of the original, which was done. Now, while all presumptions will be made in favor of the judgments of courts of general jurisdiction, we can not presume, in the face of the facts as verified by the record itself, that that was done, which was not even attempted to be done. This, instead of sustaining the order, would be to add to it.

And up to the time when application was made to vacate this judgment, no attempt ever was made to make it appear that process was attached to the original writ. Nor did the order establishing a copy in lieu of the lost declaration profess to adjudicate that process was or was not attached by the clerk. Had this been done, and the clerk had omitted to attach a copy of the process, as directed by the court, a *nunc pro tunc* order might have been awarded to supply the omission, which would relate back to the time when it should have been entered, and thus sustain the judgment upon which this execution against the body of the debtor has been issued. But the record, I repeat, utterly disproves any such assumption. And the attempt, at this late day, to resort to original proof to supply the defect in the proceedings, so as to retain the defendant in custody under the execution upon which he has been already arrested, can not be sanctioned.

Judgment affirmed.

SERVICE OF VOID WRIT, AND JUDGMENT THEREON, EFFECT OF: See *Garland v. Britton*, 52 Am. Dec. 487; *Frosch v. Schlumpf*, 47 Id. 655.

APPEARANCE AND PLEADING WITHOUT OBJECTING TO WANT OR SUFFICIENCY OF PROCESS, EFFECT OF: See *Cartwright v. Chabert*, 49 Am. Dec. 742; *Little v. Little*, 32 Id. 317; *Hanna v. McKenzie*, 43 Id. 122. The principal case was cited to the point that the absence of process complying substantially with the requisites of the act of 1799 was a fatal defect, which could not be dispensed with by acknowledgment of service or appearing and pleading, in *Little v. Ingram*, 16 Ga. 198.

INCURABLE DEFECT WITH RESPECT TO PROCESS is one for which the court is bound to dismiss the suit, but such a defect *per se* does not make the suit stand dismissed: *Wynn v. Booker*, 22 Ga. 362, citing the principal case.

HAWKINS v. STATE.

[18 GEORGIA, 322.]

DEPENDANTS INDICTED FOR AFFRAY ARE TO BE TRIED TOGETHER, and for the purposes of the trial and in making their defense are to be considered as having one common interest; consequently each defendant will not be allowed seven peremptory challenges, and if one of the defendants has introduced evidence in his behalf the state has a right to conclude the argument to the jury, although the other defendant has introduced no evidence.

SUCCESSFUL DEFENSE OF ONE WILL OPERATE AS ACQUITTAL OF BOTH DEFENDANTS where the two are indicted for an affray.

WORDS ALONE OF PARTIES WILL NOT CONSTITUTE AFFRAY; but their words accompanied by their acts respectively in drawing their knives and attempting to use them will make them guilty of an affray.

ONE WHO AIDS, ASSISTS, AND ABETS AFFRAY IS GUILTY as principal.

INDICTMENT for an affray. The opinion states the case.

I. L. Harris, for the plaintiff in error.

Saffold, solicitor general, contra.

By Court, **WARNER, J.** The defendants were indicted for an affray, which is defined by our code to be "the fighting of two or more persons in some public place, to the terror of the citizens, and disturbance of the public tranquillity:" Prince, 643.

The defendants are to be tried together, and for the purposes of the trial, and in making their defense, are to be considered as having one common interest; and this view of the question disposes of the objections made to the refusal of the court to allow each defendant to strike seven of the jurors peremptorily, and refusing to allow the counsel for one of the defendants to conclude the argument to the jury, the other defendant having introduced evidence in his behalf to the jury.

Where two are indicted for an affray, the successful defense of one will operate as an acquittal of both; as where the evidence shows that one of the parties acted entirely in self-defense, while the other assaulted and beat him, the aggressor may be guilty of an assault and battery, but neither of them guilty of an affray; and neither can be convicted on an indictment therefor; so that on the trial of an indictment for an affray, the aggressor is as much interested to show that both parties did not fight as the innocent party is to show that fact; the defense of one inures to the benefit of the other.

But it is said there is no evidence that Hawkins, one of the defendants, fought at all, and that an affray can not be com-

mitted by words alone. The evidence is that an altercation took place between the parties in a public street in Milledgeville, at the instance of Hawkins, who first accosted Bonner. Bonner then drew his knife, cut at Hawkins. Hawkins then drew his knife from his pocket, but did not use it, being prevented by the by-standers. The drawing his knife and attempting to use it on that occasion was an act quite significant of his intention, had he not been prevented from using it. The words alone of the parties, independent of their acts, would not have constituted an affray; but their words accompanied by their acts respectively, in drawing their knives and attempting to use them, were calculated to terrify the good citizens of Milledgeville, and disturb the public tranquillity: 1 Russ. on Crimes, 271.

One who aids, assists, and abets an affray is guilty as principal: *Curlin v. State*, 4 Yerg. 143. The court instructed the jury in the language of the code, in relation to the offense, and they have found by their verdict both defendants guilty; and we can not hold from the facts apparent on the face of this record that their verdict was without evidence as to all the necessary elements to constitute the offense of an affray.

Let the judgment of the court below be affirmed.

WHERE TWO PERSONS ARE TRIED TOGETHER FOR OFFENSE that requires their joint action or concurrence, such as an affray, an acquittal of one is an acquittal of both, and they may be required to join their challenges: *Cruce v. State*, 59 Ga. 83, citing the principal case.

WALLACE v. HOLLY.

[13 GEORGIA, 399.]

DEMURRER TO PLEAS ADMITS THEIR TRUTH.

SURETIES MAY PLEAD ANYTHING WHICH THEIR PRINCIPAL MIGHT PLEAD in his denial of liability on the bond.

LIABILITY OF SURETIES OF DEPUTY IS CONTINUOUS WITH THAT OF THEIR PRINCIPAL; their undertaking is to make good the official defaults of their principal.

OFFICER IS NOT TRESPASSER FOR LEVYING PROCESS REGULAR UPON ITS FACE, issued to enforce a judgment rendered by a court having jurisdiction of the subject-matter.

SHERIFF IS LIABLE FOR FAILING TO LEVY MORTGAGE FI. FA. upon the mortgaged property, although it belongs to a third person, and is in his possession adversely to the mortgagor, and the mortgage lien is superseded in consequence of a failure to record it, where the process commands him to levy upon and sell the property, designating it by full description.

HOLLY, the sheriff of Marion county, received a mortgage *fi. fa.*, and placed it in the hands of his deputy, Wallace, to be executed. Wallace accidentally mislaid it until it was too late to levy it. An action was thereupon brought against Holly for the failure to execute the *fi. fa.*, and a judgment obtained against him, which he paid. He then brought this action against Wallace and his sureties upon his bond. The defendants' pleas are stated in the opinion. The plaintiff demurred to the pleas, and the demurrer was sustained. The defendants excepted.

Jones, Benning, and Jones, for the plaintiff in error.

Worrill, contra.

By Court, NISBET, J. We do not see a hook to hang a reasonable doubt upon about this case.

There was a judgment for the money against the principal sheriff, and when this cause was before us at Columbus, we held that the deputy was concluded by it, because he was a party to it: *Holley v. Wallace*, 10 Ga. 158. Whether he would have been concluded had he not been a party it is not necessary now to determine. The sureties are sued here, and the issues are made between them and the sheriff. They pleaded that they are not liable, because it was no part of the official duty of their principal, the deputy, to levy the execution, and this being true, that there was no breach of the bond. They pleaded that the land named in the mortgage, and specified in the mortgage *fi. fa.*, belonged, at the time when the mortgage was given, to a third person, and was held adversely to the defendant in the *fi. fa.* And further, that the mortgage was not recorded until judgments were open against the mortgagor in favor of other persons, which took lien upon the land higher than that of the mortgage, and if there had been a levy and sale, the mortgagee would not have been entitled to the proceeds of the sale; and therefore the deputy sheriff was not in default in not making the levy. The demurrer to the pleas admits their truth. We hold it competent for the sureties to plead anything which their principal might plead, in his denial of liability on the bond.

Their liability is continuous with that of their principal. Their undertaking is to make good the official defaults of their principal. The question, then, is this: Is a sheriff liable for failing to levy a mortgage *fi. fa.* upon the mortgaged property because it belongs to a third person, and is in his possession,

adversely to the mortgagor, or because the mortgage lien is superseded in consequence of a failure to record it? We hold that he is. The strong ground of reliance on the part of the plaintiffs in error is, that the levy of an execution against A. upon property in possession of B. is a trespass, and the officer is not liable for failing to do what would, if done, subjects him to liability as a trespasser. And the learned counsel fortifies himself in this position with the decision of this court in *McDougald v. Dougherty*, 12 Ga. 613.

That was the case of a *fi. fa.* founded on a general judgment against A. levied upon property in the possession of B. We held the sheriff a trespasser. We held that it was the perversion of a legal process; that it was the right of the officer to judge of the fact whether property not in possession of the defendant was subject to the execution; that he must judge at his peril, and if he did levy, he must justify, and show that the property was the property of the defendant, in order to protect himself against damages. We have no fault to find with that ruling. It is the law, as settled for centuries, and which no lawyer can question without loss to his professional reputation. But we do not see how it is possible for the counsel to intrench himself behind that case. This is a different case. A general judgment binds all the property of the defendant—it is a judgment *in personam*. It makes no specification of property. The process founded upon it directs the officer to make the money out of the goods and chattels, lands and tenements, of the defendant. It points out no property, but commands the officer to raise the money out of any that belongs to him. This is no authority to the officer to disturb the peace of the world by levying upon any man's property. As a rule of right and of policy, therefore, he is limited to property in the possession of the defendant, which is *prima facie* his. He can not levy upon property in the possession of a third person, because *prima facie* it is not his. If he departs from this rule, and depart he may, it is at his own risk. If he does depart, he may ask for an indemnity, and if he departs upon the pointing out of the property by the plaintiff in execution, such pointing out raises an implied promise to indemnify. In any event, so departing, he is a trespasser. Not necessarily liable as such, for he may justify by showing that the property is subject to the *fi. fa.* If he shows that, he has only complied with the requisitions of the process, and stands acquitted. If he fails to show that, he has departed from the requirements of the process, and stands

convict. Such are the general principles upon which this court proceeded when deciding the case of McDougald and Dougherty.

The case now being considered depends upon different facts and different principles. This is the case of a mortgage *fi. fa.* founded upon a judgment of foreclosure. Without controversy, it is true that an officer is not a trespasser for levying a process, regular upon its face, issued to enforce a judgment rendered by a court having jurisdiction of the subject-matter. I cite no authority to sustain a proposition so familiar. By statute, in Georgia, the superior courts are clothed with jurisdiction over the foreclosure of mortgages upon real estate. The court had jurisdiction, then, in this case, the mortgage being upon land, over the land, the subject-matter. Nor is it questioned that the process was regular—it points out the land and directs the officer to levy upon and sell it, to pay the amount due on the mortgage, and costs. It is not necessary, to sustain our judgment, to say that a judgment of foreclosure is a judgment *in rem*. It is certainly very like it. It is not a general judgment *in personam*, because it is binding only upon the property mortgaged; whilst it differs from a judgment *in rem* in this, that the proceeding upon which it is founded does not begin with a seizure of the property. It is a judgment to enforce a specific lien, created by agreement of the parties. It is not alone a judgment as to the amount due on the mortgage, but it is also a judgment that the property mortgaged shall be sold to pay the sum adjudged to be due. The statute authorizes, indeed requires, the judgment to go to that extent. For when the money is not paid into court, in pursuance of the rule for foreclosure, the statute declares that the “court shall give judgment for the amount which may be due on the mortgage, and order the property mortgaged to be sold in such manner as is prescribed in cases of execution:” Cobb’s New Dig. 370, 371. The court, therefore, by authority of the law, has jurisdiction over the debt, over the person of the mortgagor, and also over the sale of the property. Here, then, is a judgment which ascertains the amount due on the debt and which orders the sale of the property, and that, too, by a levy; for the judgment is, that it be sold as in case of executions. In such cases the sale is preceded by a levy. Such is the jurisdiction and such the judgment—in pursuance of the judgment the process issues, commanding the officer to levy upon and sell the property, naming it specifically. Is he a trespasser if he obeys? It requires the aid of a lively imagination or a theorizing intellect to say that he is. What

right of judgment or discretion has he? His duty is to levy the process, and the process commands him to levy upon and sell the property, designating it by full description. He is not directed to raise money, as in case of a general judgment, out of the property of the defendant, but to raise it out of the property named. This case is covered by this proposition, to wit, no man is a trespasser for doing an act which the law makes it his duty to do: *Callender v. Marsh*, 1 Pick. 435; *Williams v. Amory*, 14 Mass. 27. The law and the judgment of the court which enforces it, and the process of the court which enforces the judgment, require him to levy upon the mortgaged property.

If it be his duty, under the law, to do so, he is liable if he fails, and his sureties are bound for his default. It is no part of his duty to determine whether the property belongs to the mortgagor or not, or to determine whether or not the mortgage lien has been superseded by an omission to record it. We can not allow the sheriff to usurp the functions of the court. This brings me to the consideration of two views of the case presented by the ingenious counsel for the plaintiff in error. And first, he says that the judgment is not binding upon the person in possession, for he was not before the court. As to him, the court had no jurisdiction. Assuming these things, he draws the inference, first, that he can not be divested of his right to the property by any operation of the judgment; and second, that the officer had no right to make the levy. To which it is very easy to reply, and as conclusive as easy, that no jurisdiction is assumed over him, and that a levy upon his property does not divest his right to it. His title will still be protected. He can interpose his claim or bring suit, and if the property is shown to be his, he will hold it, both against the judgment of foreclosure and the lien of the contract. So no inference can be drawn against the obligation of the officer to make the levy, from the assumption that the levy in this, or any like case, divests the title of a third person not bound by the judgment. Again, he says that the demurrer admits the fact that this property is the property of a third person, and not the property of the defendant in execution, and it must therefore be a trespass to levy upon that property. We may concede that the record does technically admit these things, but what of that? We are not here invoked to determine the right of property between these parties, but to say what was the duty of the levying officer at the time when the law required him to levy. It may be true now that this land does not belong to the mort-

gagor, but if it be so, it was equally then the duty of the officer to obey the process, leaving the future ascertainment and protection of the title to the courts. The question of the sheriff's duty originated anterior to any admission on the record, and more than that, is not at all affected by such admission. The facts in the pleas being true, we are called upon to say what is the judgment of the law upon those facts as to his duty as a levying officer; and our opinion is, that he was bound to levy, and because he did not do so, he is bound to reimburse his principal, and his sureties are bound with him.

Judgment affirmed.

DEMURRER TO PLEADING, WHAT ADMITS: See *Kellogg v. Larkin*, 56 Am. Dec. 164, and note.

JUSTIFICATION OF OFFICERS UNDER THEIR PROCESS: See *State v. McNally*, 56 Am. Dec. 650; *State v. Weed*, 53 Id. 188, and note. If a judgment is special, an execution issued in pursuance of it is an absolute protection to the sheriff in making the levy: *Hayden v. Johnson*, 59 Ga. 108. Thus a judgment of foreclosure goes against specific property, and is a mandate to the sheriff to sell it: *Harris v. Glenn*, 56 Id. 97; and on process directing the officer to seize some particular articles of property, described and pointed out in the process, he has no concern but to find what his process describes, and deal with it as the precept commands him: *Chipstead v. Porter*, 63 Id. 220; and where there is a direct judgment as to specific property, it is not certain that the sheriff can raise the question of even the defendant's title: *Snell v. Mayo*, 62 Id. 746; all citing the principal case.

SHEPHERD v. BURKHALTER.

[13 GEORGIA, 443.]

IF MORTGAGE IS NOT RECORDED IN TIME PRESCRIBED BY STATUTE, the lien of judgments obtained against the mortgagor will attach to the land; and if the land is sold under the judgment lien, the purchaser, whether he had notice of the unrecorded mortgage or not, takes the interest which was sold. This rule is not affected by the fact that the mortgagor gave notice at the sale, and that the sheriff proclaimed that he sold the land subject to the mortgage.

REGISTRY IS NOTICE OF TENOR AND EFFECT OF INSTRUMENT recorded only as it appears upon that record.

IF MORTGAGE AS IT APPEARED IN RECORD LACKED SIGNATURE, the registry is no record of the mortgage until the name of the mortgagor is placed upon the record book, and is not constructive notice of the mortgage.

VERDICT WILL BE SET ASIDE AS CONTRARY TO EVIDENCE where there was some improper bias or gross misapprehension influencing the jury to an extent shocking the understanding and the moral sense.

CLAIM in Marion superior court. The opinion states the case.
B. Hill, for the plaintiff in error.

Jones, Benning, and Jones, contra.

By Court, STARNES, J. This is a contest between a purchaser, claiming land by virtue of a sheriff's sale, under certain common-law *fi. fas.*, and the plaintiffs in a mortgage *fi. fa.* issued against the same land, and it involves a question of priority of lien.

The date of the mortgage is prior to that of the *fi. fas.*, but the claimant insists that it was not recorded within the time prescribed by law, nor foreclosed before the common-law judgments against the mortgagor were obtained, and that the latter consequently gains a preference.

To this it is objected that the purchaser had notice of the mortgage, though it was not recorded; that the land in question was sold by the sheriff, subject to the mortgage, and that it was in fact recorded.

The provisions of our statute law on the subject of recording mortgages of land are as follows: The second section of the act of 1827 requires that all deeds of mortgage upon real property "shall be recorded in the clerk's office, etc., within three months from the date of such deed." The fourth section provides that "upon failure to record any mortgage, as hereinbefore required, within the time or times hereinbefore specified for recording the same, that then and in such case, all judgments obtained before the foreclosure of the said mortgage, and also any mortgage executed after the same, and duly recorded, shall take lien on the said mortgaged property in preference to the said mortgage."

In view of the terms of this statute, it is our opinion (especially in the absence of proof affecting the conscience of the judgment creditor with notice) that if the mortgage in this case were not recorded in time, the lien of these judgments, obtained in the justice's court, attached to the land; and when it was sold under and by virtue of this lien, the purchaser, whether he had notice of the unrecorded mortgage or not, took the interest which was sold, viz., the estate of the judgment creditor in the land, and *quoad* that interest in the estate must be subrogated to the rights of the creditor.

The notice given by the mortgagor Wells, at the sheriff's sale, and the proclamation made by the sheriff, in consequence, that he sold the land subject to the mortgage, can not affect this view of the case; for the reason that the sheriff sold the interest

of the judgment creditor, whatever that was, when he sold subject to the mortgage; and if that interest was a priority of lien upon the land, to the extent of that lien it was superior, of course, to the interest of the mortgagee. In such case, neither the notice nor the sheriff's proclamation could change the law, and divest the lien of the judgment; and *pro tanto* the purchaser certainly took title to the property sold.

By some courts it has been held that a deed not duly registered is void as to creditors, with or without notice: *Washington v. Trousdale*, Mart. & Y. 385. And that a purchaser, in behalf of the creditor, holds the rights and occupies the place of the creditor, and will not be affected by notice of an unrecorded deed: *Guerrant v. Anderson*, 4 Rand. 208.

The supreme court of Massachusetts, on the other hand, has held that a creditor with notice of a previous unregistered conveyance for a valuable consideration, can not, by attachment and levy, obtain a title against the grantee: *Priest v. Rice*, 1 Pick. 164 [11 Am. Dec. 156].

However this may be, there is nothing in this record which brings home notice to the creditor, and the case is not placed upon that ground.

If the rights of the purchaser, in this case, were affected by notice of the unrecorded mortgage, it could only be as to so much of the mortgaged premises as exceeded in value the amount of the judgments under which the land was sold; for, as we have seen, to the extent of these judgments he takes the estate upon which their lien attached.

This view is consistent with that laid down by this court in the case of *Neal v. Kerrs*, 4 Ga. 161, where it was held that a junior mortgagee with notice gains no preference; because, in the latter case, the lien is created by the contract of a party whose conscience is affected with notice; in the former, the creditor being unaffected with notice, the lien is created by virtue of law.

Whether or not the rights of the purchaser in this case were influenced by notice to him, as to any amount exceeding the judgments, must depend upon the evidence of notice, and so far as we are informed by the record, no such notice appears.

If there were no signature of the mortgagor, Collins, upon the record book until more than three months had elapsed from the date of the mortgage, we hold that constructive notice can not properly be deduced from such a record. The purchaser, in such case, can be held in reason to have had notice from this

record only of what there appeared, viz., that an instrument was registered, which was incomplete, because lacking signature.

"It would seem," says one of the first lawyers of our age, "that the courts might hold, without any violation of principle, that a purchaser should not be deemed to have notice of an equitable incumbrance, by the mere registry of it, unless it was duly registered:" Sugden, 470.

Eminent courts and judges have so held. Chancellor Kent, for example, says, in the case of *Frost v. Beekman*, 1 Johns. Ch. 800, "that the purchaser is not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. The act, in providing that all persons might have recourse to the registry, intended that as the correct source of information." The chancellor goes on to say, that if the rule were otherwise, "the registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great difficulty."

The supreme court of Pennsylvania holds similar doctrine, in the case of *Heister v. Fortner*, 2 Binn. 40 [4 Am. Dec. 417], as the supreme court of the United States, in *Hodgson v. Butts*, 3 Cranch, 155. And this court, in the case of *Herndon v. Kimball*, 7 Ga. 433 [50 Am. Dec. 406], has, in principle, laid down the same rule.

Though the facts of these cases are not the same with that at bar, yet the principle involved is the same in all, viz., that the registry is notice of the tenor and effect of the instrument recorded, only as it appears upon that record.

We learned in our elementary lessons that signing, sealing, and delivering were requisites necessary to every good deed.

If, then, this instrument as it appeared in the record, lacked a signature (though the signature were attached to the original and omitted by mistake), it of course lacked one of the essential features of the mortgage deed, and was in this regard no record of that mortgage until the name of the mortgagor was placed upon the record book. If that were not done until more than three months from the date of the mortgage, then the instrument was not duly registered in terms of our statute.

Whether or not the mortgage in question did lack the signature of the mortgagor for more than three months from the date of its execution was a question of fact submitted to the jury, the evidence relating to which we are called upon to consider

in determining whether or not the new trial was properly granted in this case. His honor Judge Iverson granted a new trial, upon the ground that the evidence proved the deed to have lacked the signature until after the time prescribed, and that the verdict was consequently contrary to evidence.

It is insisted for the plaintiff in error, that there was some evidence on both sides; that the indorsement of the clerk's certificate upon the mortgage was *prima facie* evidence of its due and proper record; and that though the weight of evidence may be against this view, still it was the province of the jury to determine this; that they have done so, and their verdict should not be disturbed.

We concede that the certificate of the clerk was *prima facie* evidence of the record; but that evidence was rebutted by two unimpeached and disinterested witnesses. John Campbell swears that he saw the record after Burkhalter's purchase, as he thinks; that the signature was wanting, and that Dowd owned he had placed it there after he (Campbell) had first seen the registry. By Wiley Williams it was proved that Dowd admitted in his hearing that he had omitted to copy the signature of the mortgagor upon the record book until after the time prescribed.

When we reflect that Dowd, who furnishes the *prima facie* testimony, was one of the mortgagees, and thus deeply interested in securing to the mortgage validity and priority of lien; and that the testimony furnished by him is contradicted positively and conclusively by two witnesses who are disinterested (so far as we can judge from the record), we are constrained to hold that a case is presented for the extraordinary interposition of the court, in arresting the verdict of a jury where there is some evidence on both sides; because the conclusion is authorized that there was some improper bias or gross misapprehension influencing the jury, and that, to an extent which "shocks both the understanding and moral sense."

We will not lightly interfere with the province of the jury to decide the facts, nor encourage others to do so. But when the case presented comes clearly within the rule above stated, and recognized by this court in several cases, reason and justice make it our duty to authorize a new trial.

It was stated by the counsel for the plaintiffs in error that the court below, though of the opinion that he could sustain the motion for a new trial on the first ground only (which is the ground we have just been considering), yet said that as he did have to decide against the plaintiffs in error, he would *ex gratia*

grant a new trial on all the grounds taken, that the plaintiffs might have the opportunity of excepting on all; and our opinion on all these grounds is invoked.

Presenting, as the record plainly does, the judgment of the court in granting a new trial as based upon and solely influenced by the ground just considered, and affirming, as we do, the judgment on that ground, we deem it unnecessary, and think that it would be going out of the record, as it were, to express our opinion on the other grounds.

The judgment is affirmed.

IRREGULARLY RECORDED DEED IS NOT NOTICE: *Rushin v. Shields*, 56 Am. Dec. 436, and note.

NEW TRIAL GRANTED BECAUSE VERDICT IS AGAINST EVIDENCE, WHEN: See *Hall v. Page*, 48 Am. Dec. 236, and note; *Clark v. Whitaker*, Id. 160, and note.

RECORD OF DEED IS ONLY NOTICE OF WHAT APPEARS ON FACE OF DEED, or to which it naturally points: *Dikeman v. Parrish*, 47 Am. Dec. 455. The principal case was quoted approvingly on this point in *Grace v. Ward*, 45 Tex. 531. As to a mortgage, *bona fide* and for a valuable consideration, the record of a mortgage is notice only to the intent of the consideration expressed in such record and interest, where by mistake the record showed the debt to be less than it really was: *Gilchrist v. Gough*, 63 Ind. 589, citing the principal case. *Shepherd v. Burkhalter* was also regarded as authority for a similar principle in *Barnard v. Campan*, 29 Mich. 164.

THE PRINCIPAL CASE WAS FOLLOWED in *Smith v. Jordan*, 25 Ga. 689, and approved in *Atkinson v. Beall*, 33 Id. 158.

ROBERTS v. STATE.

[14 GEORGIA, 8.]

DEMURRER TO PLEA OF AUTREFOIS CONVICT ADMITS FACTS ALLEGED THEREIN, but denies their legal sufficiency to procure defendant's acquittal.

DEMURRER IN INDICTMENT FOR ROBBERY TO PLEA OF FORMER CONVICTION OF BURGLARY does not admit that the charge in each indictment was the same, when the plea alleges that the felony in which conviction was had was the same felony of which the defendant stood accused, but admits only that the two indictments related to the same transaction.

DEMURRER IN INDICTMENT FOR ROBBERY TO PLEA OF FORMER CONVICTION OF BURGLARY, by admitting that the two indictments related to the same transaction, becomes in the appellate court an effectual admission that the evidence of violent stealing relied upon on the trial for burglary to prove felonious intent was the same with that offered upon the trial for robbery, though the record does not show this.

PLEA OF FORMER ACQUITTAL OR CONVICTION IS SUFFICIENT only whenever the proof shows the second case to be the same transaction with the first.

PLEA OF FORMER CONVICTION OF BURGLARY IS SUFFICIENT in an indictment for robbery based on the same offense, when the record shows that in order to show felonious intent in the former the circumstances of the stealing were proved, and thus the same transaction, the robbery, was involved in both cases.

PARTY MOVING CONTINUANCE OF CRIMINAL CAUSE ON GROUND OF HIS INABILITY TO SUBPENA WITNESS, by reason of recent finding of bill, and his close confinement since his arrest, must show that he has certain witnesses, giving their names, and must state what he expects to prove by them, in order that the court may determine whether or not the testimony would be material.

MOTION FOR CONTINUANCE OF CRIMINAL CAUSE ON ACCOUNT OF POPULAR EXCITEMENT against the prisoner is within the discretion of the judge to overrule, on the ground that five months had elapsed from the alleged time of the committal of the offense, which, in his opinion, was sufficient time for the subsidence of any popular excitement arising out of the circumstances of the case; and no reason appearing to induce doubt that he has exercised his discretion wisely, his decision will be sustained in the appellate court.

SEPARATION OF JURY WITHOUT LEAVE OF COURT, AFTER THEY ARE SWORN, is not sufficient ground for setting aside verdict, either in a criminal or civil case, where the court is satisfied that the party complaining has not, and could not have sustained any injury.

BURDEN IS ON PROSECUTION, IN CASE OF IRREGULAR SEPARATION OF JURY, to satisfy the court that the prisoner has sustained no injury therefrom.

VERDICT WILL NOT BE DISTURBED BECAUSE OF IRREGULAR SEPARATION OF JURY, if the court assumes the burden of fairly and properly inquiring into the circumstances, in part by an examination of the jurors upon oath, and is satisfied that nothing has occurred which may be injurious to the prisoner.

COURT MAY CHARGE JURY THAT THEY MAY FIND VERDICT OF GUILTY ON FIRST COUNT of an indictment, inasmuch as the second is defective.

VERDICT OF "GUILTY ON THE FIRST COUNT" of an indictment is a general, not a special, verdict.

VERDICT OF "GUILTY ON THE FIRST ACCOUNT" may be corrected with respect to the orthography of the word "count," by an erasure, under the direction of the court, of the syllable "ac."

INDICTMENT for robbery. The defendants pleaded a former conviction on an indictment for burglary which they allege to be the same felony as that embraced in the present indictment. The solicitor general demurred to this plea. The demurrer was sustained, and the defendants ordered to answer over. They pleaded not guilty, and moved a continuance of the cause on the ground—1. That because of their close confinement since their arrest, and by reason of the recent finding of the bill, they had been unable to subpoena witnesses and prepare for trial; 2. That they could not have an impartial trial by reason of the popular feeling of the county excited against them. This mo-

tion was overruled. The court charged the jury that if they found the defendants guilty they must do so on the first of the two counts of the indictment, as the second count was defective. The verdict of the jury was, "Guilty on the first account." By order of the court the syllable "ac" was erased from the last word. A motion in arrest of judgment, on the ground of the dispersion of the jury, which is set forth in the opinion, and on the ground that the verdict rendered was a special verdict, and not a general verdict in accordance with the statute in such case made and provided, was overruled. The defendants excepted, and assigned error on the grounds appearing from the opinion.

Hammond and Lochrane, for the plaintiffs in error.

Thrasher, solicitor general, represented by *Glenn*, for the defendants in error.

By Court, STARNES, J. The first point for our consideration is the alleged error of the court below in overruling the plea of *autrefois convict*.

To the plea of former conviction filed by the defendants, the solicitor general demurred, insisting that it was not sufficient in law, and that the defendants were bound by the law of the state to answer the indictment. By thus demurring, the state's counsel, whilst denying the legal sufficiency of the plea, and of the matters and things therein contained, to operate the acquittal of the defendants, necessarily admitted the facts stated: *Commonwealth v. Myers*, 1 Va. Cas. 188. The main fact stated, and on which the plea rested, was that the defendants had been previously convicted on the charge of burglary, that judgment had been rendered on said conviction, and that the felony of which they had been so convicted was one and the same with the felony of which they then stood accused. Of course the solicitor, by so demurring, and admitting that this charge of robbery was the same felony as that of which the defendants had been convicted, intended only to admit that the two indictments related to the same transaction, and did not mean to admit that the charge was the same in each case. Taking this then as true, it becomes our duty to make the following inquiry: When a prisoner has been indicted for having burglariously broken and entered the dwelling of another with intent to steal the goods and chattels of the owner; and in order to manifest such intent on the trial, proof be adduced that the prisoner did violently or by intimidation from the person of the owner steal

such goods and chattels; and he be convicted, and afterwards an indictment for the robbery committed at the time be found against him, can he then be tried, if he plead *autrefois convict*, for such robbery as a separate offense?

The case made by this record invokes an answer from us to this question. The record, it is true, does not show that upon the trial of these defendants for the burglary that part of the evidence which was relied upon to show the felonious intent was the same with that which was offered upon the trial for robbery; but this is in effect admitted by the demurrer to the plea, as we have shown; and thus the question presented arises.

Of the sufficiency of the plea of former acquittal or conviction, the following is said to be the true test, viz.: whenever the prisoner might have been convicted on the first indictment, by the evidence necessary to support the second; or in other words, where the evidence necessary to support the second indictment would have sustained the first: Arch. C. P. 106; *Rex v. Clark*, 1 Brod. & B. 473; *People v. Barrett*, 1 Johns. 66; *Commonwealth v. Cunningham*, 13 Mass. 245; *Hite v. State*, 9 Yerg. 357; *People v. McGowan*, 17 Wend. 386; *State v. Risher*, 1 Rich. L. 222; *Durham v. People*, 4 Scam. 172 [39 Am. Dec. 407]; *Commonwealth v. Wade*, 17 Pick. 400; *State v. Lewis*, 2 Hawks, 98 [11 Am. Dec. 741]. This may be said to be the case in all compound felonies: 1 Russ. on Crimes, 89, note.

There seems to be some difficulty in applying this rule (as above expressed) in all cases. It may be said that the prisoner could not have been convicted on the indictment for burglary, by the proof necessary to convict on the indictment for robbery; and the evidence necessary to support the indictment for robbery would not have insured a conviction on the prosecution for burglary. If the indictment for robbery, however, had been first tried, then upon the trial of the burglary the proof necessary to support that last trial would have been such as would have been sufficient to sustain the first prosecution; because, after proof of the breaking and entering by the prisoner, the state would have proceeded to prove the violent stealing from the prosecutor, in order to show the breaking, etc., with felonious intent; and this would have been proof of the robbery.

To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately, expressed, viz., that the plea of *autrefois acquit* or *convict* is sufficient, whenever the proof shows the second case to be the same transaction with the first: *Fiddler v. State*, 7 Humph. 508;

Commonwealth v. Curtis, Thach. Cr. Cas. 206, 207. That rule is decisive of this case.

We regret that we are constrained to hold that it is so; for we have learned from this record, as well as from the statements of the counsel on both sides in the argument, that we have before us two great criminals—offenders who, from the crowns of their heads to the soles of their feet, are steeped in the very dregs of crime. We are sorry to loosen the hold which the strong arm of the law has upon these bad men. But they live in a land of laws—they are tried by a court which regards as almost holy that maxim of our fathers, that “every man is to be presumed innocent until proved to be guilty” according to law; a court which holds that it is best to maintain the “rule prescribed,” as a sure and steadfast sign to the citizen of right and wrong, even though in doing so in a particular case we suffer the most iniquitous of offenders to escape.

The rule above stated by me is that which is prescribed for this case, and it must be the law for these defendants.

This record shows that the transaction referred to in the indictment for burglary is the same with that in the prosecution for robbery, inasmuch as the pleader, in order to show the felonious intent, has made it necessary in the former to prove the circumstances of the stealing, and thus to involve the same transaction (the robbery) in both cases. If the pleader had alleged the breaking with felonious intent (which constitutes burglary), and had been able to prove otherwise than by proof of the robbery that the felonious intent was manifested, then the two might not have constituted the same transaction. But this was settled by the demurrer; and the state’s counsel, having elected to make his proof of felonious intent in this way, has put his case within the application of the rule.

In passing sentence upon these defendants, after the conviction in the case of burglary, the court no doubt graduated the penalty according to the circumstances of the transaction, thus taking into consideration the proof of the robbery; for it is to be presumed that a breaking and entering of a dwelling-house, accompanied by an actual robbery, would have been more severely punished than a breaking and entering with an intent to rob, which was not consummated. If this be so, and the defendants have been held to some degree of punishment in consideration of the robbery, to try them again for it would be, as it were, to place them in jeopardy a second time on account of the same offense; thus in some sort violating the fundamental

principle on which the plea of *autrefois acquit* and *convict* rests. Hence, again, the propriety of the rule which we recognize and apply. On this ground, we reverse the judgment of the court.

After the plea of former conviction was overruled, a motion was made by the defendants for a continuance.

The statement of the judge, preceding his certificate to the bill of exceptions in this case, gives his reasons for refusing this continuance.

We take occasion here to remark, as this statement of the judge was commented on in the argument as something extrajudicial, that we do not so regard it; but on the contrary, deem it a good and proper practice, and one to be commended. It comes to us properly, as a part of the record, and by it we learn that the court refused the motion on the first ground for two reasons: 1. Because it did not appear by the affidavit that they had any witnesses, and no names of witnesses were given; 2. They had five months in which to have made preparations, and not having done so, they were guilty of laches.

We think the court was certainly right in the first reason given. It is a well-established rule in all applications for continuance on this ground, that the party moving shall show that he has certain witnesses, giving their names, and shall state what he expects to prove by them, in order that the court may determine whether or not the testimony would be material.

As this was not done, the court rightly refused the motion on this ground.

The judge's certificate also assigns as a reason why he refused the motion on the other ground taken, that five months had elapsed from the time the offense was alleged to have been committed; that this was in his opinion sufficient time for the subsidence of any popular excitement arising out of the circumstances of the case, and this he thought should take this case out of the rule laid down by this court in the cases of *Howell v. State*, 5 Ga. 48, and *Bishop v. State*, 9 Id. 121.

Judge Starke was in a situation best to determine this. He has exercised his discretion in doing so, and we see no reason to doubt that he has done so wisely.

Error is also alleged in that the court directed the cause to proceed, though the jury had dispersed after being sworn.

By the record, it appears that the jury, after they were sworn, the judge himself having retired for a brief space, left the box without leave of the court, and most of them went out of the court-room for a few moments. On their return the judge in-

investigated the matter. The jury were examined upon their oaths, and by such examination the court ascertained that one had gone only to the door, and had conversed with no one, and no one had spoken to him on any subject. The others had been absent from necessity, and were not aware that leave should have been formally obtained. He also ascertained that the deputy sheriff had been out with those who went and returned by one of the doors of the court-house, and had not conversed with them; that, with two exceptions, they had conversed with no one on any subject, nor had they been spoken to by any one on any subject. Of the two exceptions, one stated that he had some conversation with his fellows about the case, but did not state the conversation; the other stated that he had met with one of his fellow-citizens, who asked him if his family were well, and if he were on the jury, and that this was all the conversation he had with any one.

From this examination, the court below was satisfied that the presumption that the separation of the jury was hurtful to the prisoner should be removed, and that he could be fairly and properly tried by them.

The investigation seems to have been carefully made by the court, who thus assumed the *onus* (which in the case of *Monroe v. State*, 5 Ga. 85, this court holds as resting on the state in all cases of such separation by the jury) of showing "beyond a reasonable doubt that the defendant has sustained no injury on account of the separation;" and from the investigation it appears that the dispersion was accidental, and from inadvertence; that the jury had no conversation or intercourse during their dispersion with any one which might prejudice the rights of the prisoners, and were therefore, as jurors, *probi et legales homines*.

It was insisted in the argument, that the mere fact of the jury having separated, and having gone out of the court-room, and by mixing with or passing through the crowd assembled; having placed themselves in a situation where they might have heard some remarks injurious to the prisoners, should be deemed sufficient to disqualify them.

We fear that this rule would be practically very embarrassing, and as we think that it is not necessary to the pure administration of justice, we can not sanction it.

We know that there are adjudicated cases which seem to support it. But we think that a different rule, and that which we approve, is in other cases supported with more reason and learn-

ing. Such are several cases decided in New York, and which will be found in *Horton v. Horton*, 2 Cow. 589; *People v. Douglass*, 4 Id. 26 [15 Am. Dec. 332]; *Oliver v. Trustees*, 5 Id. 284; *People v. Ransom*, 7 Wend. 423. In the last of these cases the court, by Mr. Justice Sutherland, said: "The conclusion from all cases decided in this state is, that any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jury themselves, will not be a sufficient ground for setting aside the verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not and could not have sustained any injury."

This we adopt as the best rule, when to it is subjoined the requisition above stated in *Monroe's Case*, viz., that the burden of satisfying the court that the prisoner has sustained no injury from the separation is on the state, and not on the prisoner.

In this case, the court below assumed this burden for himself, as we have said, and his conclusion is perhaps on this account the more satisfactory.

We ought not to pass from this ground, perhaps, without noticing more particularly one case which was strongly relied on by the counsel for the prisoner as being strikingly in point, and as sustaining their position. This was the case of *Overbee v. Commonwealth*, 1 Rob. (Va.) 756. Here a juror is stated to have passed out of the court-house, without knowledge of the court, through a crowd of persons, and returned in a few minutes. Afterwards, being examined upon oath, he deposed that he had not held communication with any person whatever. In reviewing this case, the court says, without giving any reason for the opinion: "It seems to the court that the separation of the jury was sufficient cause for setting aside the verdict."

It may have been that there were circumstances known to the court which do not appear to us, authorizing the conclusion, that notwithstanding the sworn statements of the juror, there was something suspicious in his conduct, and therefore they may have thought it was better that the jury should be re-organized. It does not, at all events, appear that the court below was satisfied, by an examination into all the circumstances, that nothing hurtful to the prisoner had occurred by reason of such separation.

If, however, that court intended to hold that the mere separation as stated was sufficient to disqualify the jury, because that the juror might have heard remarks prejudicial to the prisoner, even though the judge, by his examination, had satisfied him-

self that nothing injurious to that prisoner had transpired, then we differ from that court, and differently decide; putting our decision distinctly on the ground that when such separation of a jury occurs, if the court assumes the burden of fairly and properly inquiring into the circumstances (in part by an examination of the jurors upon oath), and is satisfied that nothing has occurred which may be injurious to the prisoner, the verdict should not be disturbed.

It was urged, also, that the court committed error in charging the jury that they might find a general verdict of guilty or not guilty upon the first count, as well as in receiving such verdict. And also that the court erred in causing or permitting the erasure of certain letters from the verdict.

This charge of the court was right, we think, and not at all conflicting with any provision of our penal code. It was not a special verdict which was rendered, but a general verdict of guilty on the only count in the indictment upon which the prisoners could be tried and convicted.

The erasure complained of was simply a correction, under the direction of the court, of the orthography of the word "count," and was properly made.

WHAT FACTS SUSTAIN PLEA OF FORMER ACQUITTAL OR CONVICTION.—"It is a principle in probably every system of jurisprudence, certainly in ours, that a controversy once conducted to final judgment can not be renewed in a fresh suit between the same parties, though in some circumstances there may be a retrial of the issue in the original cause. In the criminal law in England this doctrine has received form in the maxim that, as Blackstone expresses it, 'No man is to be brought into jeopardy of his life more than once for the same offense:' 4 Bla. Com. 335. Yet a comparison of the English adjudications, not speaking now of *dicta* of judges, with this maxim, will probably show that it is not quite supported by them. In this country, we have taken the maxim itself for our unbending rule, superseding thereby the common law as adjudged, if really differing from it. The constitution of the United States provides that 'no person shall be * * * subject, for the same offense, to be twice put in jeopardy of life or limb:' Const. U. S., amend., art. 5. And though this provision binds only the United States, not extending to the states—a question on which judicial opinions formerly differed—the constitutions of nearly all the states have the same provision; and the courts of all receive it as expressive of the true common-law rule:" 1 Bishop's Cr. Law, secs. 980, 981. "But this rule has a deeper foundation than mere positive enactment, it being, as Mr. Justice Story remarked, imbedded in the very elements of the common law, and uniformly construed to present an insurmountable barrier to a second prosecution, where there has been a verdict of acquittal or conviction regularly had upon a sufficient indictment. It is upon the ground of this universal maxim of the common law that the pleas of *autrefois acquit* and of *autrefois convict* are allowed in all criminal cases:" 3 Greenleaf's Ev. 137. *United States v. Gibert*, 2 Sumn. 42.

The right not to be put in jeopardy a second time for the same cause is as sacred as the right of trial by jury, and is guarded with as much care by the common law and the constitution: *Per* Black, C. J., in *Dinke*y v. *Commonwealth*, 17 Pa. St. 126; S. C., 55 Am. Dec. 542. Where, however, no jeopardy has taken place, as where the indictment was defective, or the jury was never impaneled, the prisoner may be tried again: See *People v. Fisher*, 28 Id. 501.

WHAT CONSTITUTES JEOPARDY: See note to *State v. McKee*, 21 Am. Dec. 505, discussing this subject. See also an article on former jeopardy in 17 Am. Law Rev. 735. And see, upon the subject of this note generally, 1 Bishop's Cr. Law, sec. 1048; Wharton's Cr. Ev., sec. 571; 3 Greenl. Ev., sec. 35; Freeman on Judgments, secs. 225, 318.

OFFENSES CHARGED IN TWO INDICTMENTS MUST BE SAME.—In this note we purpose discussing what facts will sustain the plea of former acquittal or conviction; that is, in what cases the offenses charged in the two indictments will be sufficiently similar so that the acquittal or conviction upon the first indictment will bar, if pleaded, a prosecution under the second indictment; for the offenses charged in the two indictments must be substantially the same: *Jenkins v. State*, 78 Ind. 133; *Thomas v. State*, 40 Tex. 36; *Rex v. Bird*, 5 Cox C. C. 11; S. C., T. & M. 437; or, as we shall see, they must be of the same nature or the same species, so that the proof of one involves the proof of the other, or such that one is a part or constituent element of the other. A plea of former acquittal is good if it shows an indictment, trial, and acquittal, in a court of competent jurisdiction, for the same crime charged in the case at bar: *Burk v. State*, 81 Ind. 128; *Williams v. State*, 13 Tex. App. 285. And if the pleader omit to state that the offenses charged in the two indictments are one and the same, the plea is bad on demurrer: *McQuoid v. People*, 3 Gilm. 76. There must be further proof of the identity of the offenses, in case of indictments for receiving stolen goods, than that the goods described in the second are such that the averments of the first might describe them: *Commonwealth v. Sutherland*, 109 Mass. 342.

The test relied on in determining whether a plea of former acquittal or conviction will avail as a bar is that the facts alleged in the second indictment must be such that if proved they would have procured a legal conviction upon the prior indictment under which the prisoner has been acquitted or convicted. In that case the plea will be good though the offense be charged by whatever name: *Durham v. People*, 4 Scam. 172; S. C., 39 Am. Dec. 407; *Dinke*y v. *Commonwealth*, 17 Pa. St. 126; S. C., 55 Am. Dec. 542; *State v. Johnson*, 12 Ala. 840; *Dominick v. State*, 40 Id. 680; *Foster v. State*, 39 Id. 229, 233; *State v. Keogh*, 13 La. Ann. 243; *State v. Vines*, 34 Id. 1079, 1082; *Commonwealth v. Roby*, 12 Pick. 496; *State v. Birmingham*, Busb. L. 120; *State v. Revels*, Id. 200; *State v. Jesse*, 3 Dev. & B. L. 93; *Price v. State*, 19 Ohio, 423; *Heikes v. Commonwealth*, 26 Pa. St. 513; *State v. Glasgow*, Dudley (S. C.), 40; *Hite v. State*, 9 Yerg. 357; *Simco v. State*, 9 Tex. App. 338; *Ex parte Rogers*, 10 Id. 655; *Rex v. Vandercomb*, 2 Leach, 4th ed., 708, 716; S. C., *sub nom.* *Rex v. Vandercom*, 2 East P. C. 519. This test is applied throughout all the decisions upon this subject, and from it as a center radiate the different doctrines maintained. All the cases concur in applying this principle, but in the method of application much contrariety of opinion appears. But this is perhaps not astonishing when the generality and consequent elasticity of the rule is considered.

PLEA OF FORMER ACQUITTAL IS NOT GOOD WHEN ACQUITTAL IS OBTAINED BECAUSE OF VARIANCE between the allegations of the indictment

and the proof adduced. The verdict must be rendered upon the merits, and when a legal conviction was impossible because of such a variance, the plea will not avail. In fact, the defendant may be considered as not having been in jeopardy the same as when he is tried upon an insufficient and defective indictment. But the test laid down above applies; for when the second indictment is laid, charging the offense in such a manner that a variance will not be met with, the facts as alleged in this second indictment will be materially different from the allegations of the first indictment (for the variance, to produce an acquittal, must be material); and hence the proof of the facts alleged in the second indictment would not secure a conviction upon the first indictment. The offenses charged in the two indictments will be distinct, and not the same, as is essential to support a valid plea: *Ex parte Rogers*, 10 Tex. App. 655; *Martha v. State*, 26 Ala. 72; *People v. McNealy*, 17 Cal. 332; *State v. Stebbins*, 29 Conn. 463; *Guedel v. People*, 43 Ill. 228; *Commonwealth v. Goodenough*, Thatcher Cr. Cas. 132; *Commonwealth v. Curtis*, Id. 202; *Commonwealth v. Farrell*, 105 Mass. 189; *Commonwealth v. Chesley*, 107 Id. 223; *State v. McCoy*, 14 N. H. 364; *Canter v. People*, 38 How. Pr. 91; *Hite v. State*, 9 Yerg. 357; *Rex v. Phillips*, 1 Jur. 427. A variance in the name of the party whose property is stolen, or who is injured by the offense, is material, as "H. Franks" for "H. Frank:" *Parchman v. State*, 2 Tex. App. 228; S. C., 28 Am. Rep. 435; "Brison" for "Prison:" *Pennsylvania v. Huffman*, Add. 140; "Josiah Thompson" for "Josias Thompson:" *Commonwealth v. Mortimer*, 2 Va. Cas. 325; "A. & B." for "A. & C.:" *Commonwealth v. Wade*, 17 Pick. 395, 400; and in general, a misnomer of the party injured is a material variance: *People v. McNealy*, 17 Cal. 332; *Morgan v. State*, 34 Tex. 677. Acquittal on a charge of embezzling cloth and other materials of which overcoats are made is no defense to an indictment for embezzling overcoats, although the same facts which were proved on the trial of the first indictment are relied upon in support of the second: *Commonwealth v. Clair*, 7 Allen, 525. That a note stolen was payable at a certain bank, if averred, is material: *Hite v. State*, 9 Yerg. 357. Acquittal on charge of burglary committed in one county is no bar to an indictment for the same offense committed in another county: *Methard v. State*, 19 Ohio St. 363. Where the offenses charged in the first and second indictments are upon the face of the pleadings legally distinct, no averment that they are one and the same offense can make them so; therefore, if the variance is in a thing material, the plea of *autrefois acquit* can not be sustained; but otherwise if the variance is immaterial: *Commonwealth v. Somerville*, 1 Va. Cas. 163; S. C., 5 Am. Dec. 514; *Hite v. State*, 9 Yerg. 357. If the variance is immaterial, and a valid and legal conviction could have been procured upon the indictment notwithstanding the defect, an acquittal in such case will be a good plea in bar to a subsequent indictment for the same offense: *Rex v. Emden*, 9 East, 437; *Rex v. Sheen*, 2 Car. & P. 634; *Rex v. Clark*, 1 Brod. & B. 473; *United States v. Nickerson*, 17 How. 204, 208; *Commonwealth v. Squire*, 1 Met. 258; *State v. Reed*, 12 Md. 263; *Williams v. Commonwealth*, 78 Ky. 93; *Dinkey v. Commonwealth*, 17 Pa. St. 126; S. C., 55 Am. Dec. 542; *Lee v. State*, 26 Ark. 260; S. C., 7 Am. Rep. 611. Where, although the indictment is defective, the trial has been proceeded with and the prisoner acquitted, it will be presumed, in the absence of evidence, to have been upon the merits, and will be a bar to further prosecution: *Croft v. People*, 15 Hun, 484. And *autrefois acquit* will be sustained, if from the whole record there appears no variance or misnomer of party alleged to have been murdered: *Oneil v. State*, 48 Ga. 86. Where a variance appears in two indictments, as to number of articles

taken and the names of the owners, it will be disregarded, in the absence of proof that the offenses are in fact different: *People v. McGowan*, 17 Wend. 386. And though there be an otherwise material misnomer, yet the plea will be good if the defendant aver and prove that owner of goods was same person, notwithstanding variance in surname, and that he was as well known by one name as the other: *State v. Risher*, 1 Rich. L. 219.

SAME OFFENSE CAN NOT BE SPLIT AND PROSECUTED TWICE.—A subtle distinction is involved here, for as we shall see the same act may, and in many cases does, give rise to two or more distinct offenses, each of which may be separately prosecuted. Yet it is well settled that the same offense can not be split and prosecuted under different names. An acquittal or conviction under one charge is a good bar to a subsequent prosecution for substantially the same offense, though it be charged under a different name: *Rex v. Britton*, 1 Moo. & R. 297; *Commonwealth v. Kinney*, 2 Va. Cas. 139; *People v. Burden*, 9 Barb. 467; *Francisco v. State*, 24 N. J. L. 30; *Fisher v. Commonwealth*, 1 Bush, 211; *Jackson v. State*, 14 Ind. 327, 328; *Moore v. State*, 71 Ala. 307; S. C., 15 Rep. 428. Charging the same crime in a different way will not justify two prosecutions: *State v. Cameron*, 3 Heisk. 78; *Holt v. State*, 38 Ga. 187; where the charge is substantially the same, the difference being immaterial: *Rex v. Clark*, 1 Brod. & B. 473. Mere different description in the second indictment will not constitute different offense, but if it appear on the trial that the offense was the same, *autrefois acquit* will be valid, and the offenses may be shown by parol to be the same notwithstanding the record: *Buhler v. State*, 64 Ga. 504; *Rake v. Pope*, 7 Ala. 161. "Same offense" in a state constitution prohibitory of a second jeopardy does not signify the same offense *eo nomine*, but the same criminal act or omission: *Hirshfield v. State*, 11 Tex. App. 207.

Thus, for example, the stealing of several articles at the same time and place, even though they belong to different owners, constitutes but one crime, and can be prosecuted but once. An indictment could not be found for the larceny of one of the articles and after a verdict another indictment sustained for the stealing of the remaining articles. Indeed, to put such a power in the hands of the prosecuting attorney would be to render the salutary doctrine of prior jeopardy in many instances practically nugatory: *Jackson v. State*, 14 Ind. 327, 328; *Hamilton v. State*, 36 Id. 280; *Fritz v. State*, 40 Id. 18; *State v. Williams*, 10 Hunph. 101; *Lorton v. State*, 7 Mo. 55; *Hoiles v. United States*, 3 McArthur, 370; S. C., 26 Am. Rep. 106; *Wilson v. State*, 45 Tex. 76; S. C., 23 Am. Rep. 602. See *State v. Hennessey*, 23 Ohio St. 339; S. C., 13 Am. Rep. 253; *contra*, *State v. Thurston*, 2 McMull. 382. Stealing a horse, wagon, and harness at one time and place is but one offense, and prosecutable but once: *State v. Cameron*, 40 Vt. 555; *Fisher v. Commonwealth*, 1 Bush, 211. Stealing two pigs simultaneously subjects the thief to but one liability: *Regina v. Brettell*, Car. & M. 609. Taking coal from different mine owners, but raising it by means of the same shaft, is but one entire offense: *Regina v. Bleasdale*, 2 Car. & K. 765. But an interval of half an hour having elapsed between the taking of two articles was held to make two distinct indictable offenses: *Rex v. Birdseye*, 4 Car. & P. 386.

The possession of several forged or counterfeit bank notes or bills with intent to pass them is but one offense, and an acquittal or conviction on an indictment based on one of the bills is a bar to indictments based on the others: *State v. Benham*, 7 Conn. 414; *People v. Van Keutzen*, 5 Park. Cr. 66. So of a conviction for uttering one of them: *State v. Eggesht*, 41 Iowa, 574; S. C., 20 Am. Rep. 612. So an *autrefois acquit* of the forgery is a bar to an

indictment for uttering the bill: *People v. Allen*, 1 Park. Cr. 445. The possession of two counterfeit plates at the same time is one offense, for which a person can not be twice prosecuted: *United States v. Miner*, 11 Blatchf. 511. Conviction of swindling may be pleaded in bar to a prosecution for uttering a forged instrument, the transaction being the same: *Hirshfield v. State*, 11 Tex. App. 207.

Other instances of the application of this rule are contained in *State v. Fayetteville*, 2 Murph. 371; *State v. Rollins*, 12 Rich. L. 297; *State v. Johnson*, 12 Ala. 840; *State v. Wiles*, 26 Minn. 381; *Fuldler v. State*, 7 Humph. 508; *State v. Hardy*, 47 N. H. 538; *Commonwealth v. Kinney*, 2 Va. Cas. 139. In *Rex v. Champneys*, 2 Moo. & R. 26, it was held that an insolvent debtor acquitted on a former indictment for omitting goods out of his schedule might be again indicted for omitting other goods not specified in the former indictment, but such a course, it was said, ought not to be taken except under very peculiar circumstances.

WHEN SAME ACT CONSTITUTES TWO OR MORE DISTINCT OFFENSES, EACH IS SEPARATELY INDICTABLE. The defendant may be separately punished for each offense, and an acquittal, or conviction, or pardon of one of these distinct offenses is no bar to the prosecution of the others: *Wemyss v. Hopkins*, L. R., 10 Q. B., 378; *State v. Rankin*, 4 Coldw. 145; *State v. Taylor*, 2 Bailey, 49; *State v. Glasgow*, 1 Dudley (S. C.), 40; *Teat v. State*, 53 Miss. 439; *Commonwealth v. Tenney*, 97 Mass. 50; *Olathe v. Thomas*, 26 Kan. 233; *Hawkins v. State*, 1 Port. 475; S. C., 27 Am. Dec. 641. And the test will here apply. In each case the plea of *autrefois acquit* or *convict* is bad, because the facts of the two offenses are different. The proof of the allegations of the second indictment would not secure a legal conviction under the allegations of the first. A well-settled example of this—of two offenses distinct from each other, arising from the same act—occurs when the criminal act affects two different persons: *State v. Fife*, 1 Bailey, 1. Under the head of “variance,” we have seen that the misnomer of the person affected by the criminal act is a material variance, the two indictments in such case charging different crimes. So where the defendant, by his act, injures in fact two or more persons, though it be accomplished in the same transaction, yet as many distinct offenses are committed. The facts of one are materially variant from those of the other. Such is the case where two or more persons are shot at the same time: *Vaughan v. Commonwealth*, 2 Va. Cas. 273; or murdered: *Clem v. State*, 42 Ind. 420; S. C., 13 Am. Rep. 369; *People v. Alibez*, 49 Cal. 452. So where an assault, or an assault and battery, is committed upon several at the same time: *State v. Nash*, 86 N. C. 650; S. C., 41 Am. Rep. 472; 26 Alb. L. J. 293; *State v. Standifer*, 5 Port. 523; *Crocker v. State*, 47 Ga. 568; *Greenwood v. State*, 64 Ind. 250; *State v. Parrish*, 8 Rich. L. 322; *State v. Damon*, 2 Tyler, 387. An intent to kill two persons by the same act constitutes two distinct offenses: *People v. Warren*, 1 Park. Cr. 338. Advising at the same time two slaves to abscond constitutes two distinct offenses, and a conviction of one offense is no bar to the prosecution of another: *Smith v. Commonwealth*, 7 Gratt. 593. An indictment charging the administering of poison to three persons is, however, not bad for duplicity: *Ben v. State*, 22 Ala. 9.

Where, out of the same act, offenses of a different nature arise, susceptible of distinct and characteristic proof, they constitute distinct offenses, and the defendant may be tried twice or as many times as there are such distinct offenses. An acquittal of larceny is no bar to a prosecution for obtaining goods by false pretenses, though the same evidence is adduced by the pro-

execution in each case: *Dominick v. State*, 40 Ala. 680; see *State v. Sias*, 17 N. H. 558; *Regina v. Henderson*, 2 Moody, 192. A conviction or acquittal of larceny is not a bar to a prosecution for receiving and concealing stolen goods: *Foster v. State*, 39 Ala. 229, 233. An acquittal of a charge of stealing a hog is not a bar to a subsequent indictment for wantonly and willfully killing the hog: *State v. Ellison*, 4 Lea, 229.

We have seen that an acquittal of forgery is a bar to an indictment for uttering the instrument: *Parker v. Allen*, 1 Park. Cr. 445. This is, however, denied in *Harrison v. State*, 36 Ala. 248, on the ground in that case that no evidence of the uttering appeared to have been produced upon the trial for forgery: See also *People v. Ward*, 15 Wend. 231. Rape and assault with intent to commit rape: *State v. Jesse*, 3 Dev. & B. L. 98; bigamy and adultery: *Swancoat v. State*, 4 Tex. App. 105; adultery and fornication: *State v. Lash*, 1 Harr. (N. J.), 380; 32 Am. Dec. 397; *contra*, *Dinkey v. Commonwealth*, 55 Id. 542—have been held to be distinct offenses. Burglary and larceny are distinct offenses, and a conviction of one is no bar to a prosecution of the other: *State v. Martin*, 76 Mo. 337; see *State v. Kelsoe*, Id. 505; reversing S. C., 11 Mo. App. 91; *Wilson v. State*, 24 Conn. 57; but see *infra*, "Conviction or acquittal of greater crime." An acquittal on charge of burglary and stealing is no bar to indictment charging the same offense as burglary with intent to steal, for these are distinct offenses: *Rex v. Vandercomb*, 2 Leach, 4th ed., 708, 716; S. C., *sub nom.* *Rex v. Vandercom*, 2 East P. C. 519. One indicted for suffering a mare to be run in a horse-race can not show prior conviction for running a horse at the race, and prove by parol that in the first indictment it was a mare, and not a horse; he can not so contradict the record: *Conway v. State*, 4 Ind. 94. Other examples of distinct offenses, differing in their nature and requisites of proof, are met with in *Commonwealth v. Roby*, 12 Pick. 496; *State v. Elller*, 65 Ind. 282; *State v. Horneman*, 16 Kan. 452; *Commonwealth v. Bakeman*, 105 Mass. 53; *State v. Ross*, 4 Lea, 442. Although proof of one particular fact is necessary to a conviction under either of two statutes, yet if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either is no bar to prosecution and punishment under the other: *Morey v. Commonwealth*, 108 Mass. 433.

CONVICTION OR ACQUITTAL OF GREATER CRIME IS BAR to prosecution of less crime included within it. When within the charge of a greater offense a less offense is included which forms a constituent element of the greater, and is susceptible of proof by means of evidence introduced in support of the greater, a conviction of the less crime may be had under the indictment charging the greater: *Rex v. Oliver*, 8 Cox C. C. 384; *Livingston v. Commonwealth*, 14 Gratt. 592; *State v. Reed*, 40 Vt. 603; *State v. Coy*, 2 Aik. 181; *State v. Taylor*, 3 Or. 10; *Commonwealth v. Griffin*, 21 Pick. 523; *State v. Waters*, 39 Me. 54; *Rex v. Yeadon*, 9 Cox C. C. 91. Thus it follows that the indictments need not charge the identical offense, but if the charge in the prior indictment is such that the evidence offered must have been sufficient to have covered the less offense charged in the second indictment, or this appear from parol evidence to have been actually the case, and if the defendant might have been convicted of the less offense under the first indictment, a failure to so convict will be a virtual acquittal of the less offense, while a conviction will be virtually a conviction of both offenses: *Sanders v. State*, 55 Ala. 42; *State v. Standifer*, 5 Port. 523; *Thomas v. State*, 40 Tex. 36; *Dunn v. State*, 70 Ind. 47; *State v. Townsend*, 2 Harr. (Del.) 543; *State v. Pitts*, 57 Mo. 85. In this case it will be noticed that the second in-

dictment being for a less offense, the test that the proof of the allegations of the second indictment should be sufficient to procure a legal conviction on the first indictment will not apparently apply; that is, if we consider this test as requiring that the full offense charged in the first indictment must be established by the proof of the second. But as in this case the defendant might have been convicted of the minor offense under the first indictment, in case of an acquittal thereon, or has been virtually convicted of it when convicted of the greater crime of which the minor offense is a mere element, not only does the gist of the rule of former jeopardy apply, but the test of similarity is really present. For the proof of the allegations of the second indictment for the minor offense would have secured a conviction of that offense if proved under the first indictment, upon which, in fact, an acquittal was reached; and virtually did obtain such a conviction where the defendant was convicted on the first indictment. The rule is, however, well settled, and is manifestly in accordance with the spirit of the rule respecting former jeopardy.

We have seen, *supra*, under the head of "Distinct offenses," that burglary and larceny are distinct crimes, and a prosecution of one will not bar a prosecution for the other. Upon this there is a conflict of authority. Some decisions hold that where, in the perpetration of burglary, larceny is committed, the less will be included within the former, at least, when the indictment is for burglary and larceny, or burglary with intent to commit larceny, or when it appears that the larceny was proved, as in the principal case, to show the intent and an acquittal or conviction of the burglary, will be a bar to prosecution for the larceny: *State v. Standifer*, 5 Port. 523; *People v. Smith*, 57 Barb. 46; *State v. De Grafenreid*, 9 Baxt. 287. For two convictions can not be founded on the same intent: *State v. De Grafenreid*, *supra*. But in *Howard v. State*, 8 Tex. App. 447, it is held that burglary with intent to commit theft is no bar to a prosecution for the theft; otherwise, however, if the indictment for burglary had also charged theft. The indictment charged both burglary and larceny, and the prisoner was convicted of the former, in *Bell v. State*, 48 Ala. 684; S. C., 17 Am. Rep. 40. This was held to be an acquittal of larceny, and the judgment having been reversed, and the jury having found, upon the second trial, the defendant guilty of larceny, the verdict was held to be a nullity, and their discharge without finding a verdict of burglary operated as an acquittal of this. *Copenhagen v. State*, 15 Ga. 264, was a case similar to the principal case. This case held that a conviction for burglary was a good bar to a subsequent prosecution for robbery, when the circumstances of the robbery were put in proof, but not so if the defendant was acquitted of the robbery; this would not be a bar to burglary, as the circumstances are not included. But *quære*, whether an acquittal of robbery would not bar a prosecution for the burglary, not only on the ground that the state can not split offenses, but also that a conviction or acquittal of a less included offense is a bar to a subsequent prosecution for the greater and including offense, as we shall see *infra*. The question should rest upon the determination of the question whether burglary and robbery are distinct offenses, and thereupon this decision appears, at least, somewhat inconsistent, for it decided them in one case to be of the same nature, so that a conviction of burglary bars a prosecution for the robbery; but then contradicts itself in asserting virtually that they are distinct, for the acquittal of robbery, it is held, will not bar prosecution for the burglary committed.

Of the broad doctrine of the principal case, that a jeopardy on one indictment will bar a second "whenever the proof shows the second case to be is.

same transaction with the first," Mr. Bishop says: "This doctrine with the decision based upon it is inconsistent with the proposition—sustained, as the reader has seen, by various other courts—that indictments for burglary and larceny can both be prosecuted to conviction, when a prisoner breaks into a dwelling-house and therein steals." The doctrine of the principal case is certainly broad. And from the opinion it is apparent that the court is well aware of the fact. But Mr. Bishop may seem to depart from his usual consistency if the cases cited above, which hold that indictments for burglary and larceny can not both be prosecuted to a conviction, are considered. There is a lamentable conflict of authority, but the rule sustained by the principal case, if it be confined to the facts of that case, can hardly work injury, and is certainly conformable to the tenor of the rule of former jeopardy. An acquittal of robbery is a bar to a subsequent prosecution of larceny committed by the same act: *People v. McGowan*, 17 Wend. 386; so of a conviction: *State v. Brannon*, 55 Mo. 63; S. C., 17 Am. Rep. 643. An acquittal on indictment for murder committed in the perpetration of a burglary is a bar to a subsequent prosecution for burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence: *Regina v. Gould*, 9 Car. & P. 364. An acquittal of murder bars prosecution for the same offense as manslaughter: *State v. Standifer*, 5 Port. 523. Assault and battery with intent to commit murder embraces simple assault and battery: *State v. Stedman*, 7 Port. 495. An acquittal on an indictment for seduction is a good plea in bar of a subsequent indictment, charging the same offense as fornication and bastardy, for the defendant may be found guilty of the latter offense under the indictment for seduction, since fornication is the essential fact constituting crimes arising out of illicit carnal connection, and is included within them: *Dinke v. Commonwealth*, 17 Pa. St. 126; S. C., 55 Am. Dec. 542.

But where the less offense is not included within the greater, a conviction for the less can not be had; and therefore an acquittal of the greater will, in such case, be no bar to a subsequent prosecution for the less: *Mumford v. State*, 39 Miss. 558. So if an indictment for murder does not charge assault and battery, no conviction for the latter offense being possible, an acquittal of the murder will not bar a further prosecution of the less offense: *Moore v. State*, 59 Id. 25; *Regina v. Smith*, 34 U. C. Q. B. 552; *Regina v. Bird*, 2 Eng. L. & Eq. 448; S. C., 2 Den. C. C. 94; 5 Cox C. C. 20. See *Wright v. State*, 5 Ird. 527. So in case of different degrees of murder: *Dedien v. People*, 22 N. Y. 178. And when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act: *State v. Elder*, 65 Ind. 282, 285; and see "Distinct offenses," *supra*. So where, in accordance with the common law, under an indictment for a felony, a conviction of a misdemeanor can not be had, a conviction or acquittal of the felony will not bar the prosecution of the same offense as a misdemeanor, and *vice versa*: *Commonwealth v. Quann*, 2 Va. Cas. 89; *People v. Saunders*, 4 Park. Cr. 196; *State v. Wightman*, 26 Mo. 515; *Dinke v. Commonwealth*, 17 Pa. St. 126; S. C., 55 Am. Dec. 542; see *State v. Wheeler*, 23 Id. 212. But where the English system of criminal procedure does not prevail, and a verdict of guilty of a misdemeanor may be found under an indictment for a felony, the conviction of the felony will bar a further prosecution of the misdemeanor, and *vice versa*: *Cameron v. State*, 13 Ark. 712; *State v. Nichols*, 38

Id. 550; *Murphy v. Commonwealth*, 23 Gratt. 980; *Canada v. Commonwealth*, 22 Id. 899.

ACQUITTAL OR CONVICTION OF LESS OFFENSE OF SAME NATURE as greater, subsequently charged, is a bar to the prosecution on the second indictment. Two cases arise here: the first where the indictment is for the greater offense, and the conviction of the less offense thereunder is an acquittal of the greater offense charged, and bars a second prosecution for the latter; the second where the conviction or acquittal of the less offense is upon an indictment charging no more than that offense, but the jeopardy nevertheless bars a subsequent prosecution for the same offense charged as a greater crime. The latter case is the converse of the rule laid down just above.

The first case depends upon the principal that a verdict of guilty of a less offense under an indictment for the greater is virtually an acquittal of the remainder of the offense. And though the defendant move for and obtain a new trial, yet this is no waiver of the acquittal, and upon the second trial he can be convicted of no greater offense than that of which he was found guilty on the first trial, whether the second trial be upon the same or another indictment: *State v. Martin*, 30 Wis. 216; *Swinney v. State*, 8 Smed. & M. 576; *State v. De Laney*, 28 La. Ann. 434; *People v. Apgar*, 35 Cal. 389; *People v. Gilmore*, 3 Id. 376; *People v. Backus*, 5 Id. 278; *Miller v. State*, 58 Ga. 200; *Lewis v. State*, 51 Ala. 1. One convicted on one of three counts, having moved for and obtained a new trial, is entitled to his discharge if acquitted at the second trial on the same count: *Campbell v. State*, 9 Yerg. 333; S. C., 30 Am. Dec. 417. And he can be retried only on the count on which he was convicted: Note to *State v. Solomons*, 27 Id. 479. So an acquittal of manslaughter on an indictment for murder is an acquittal of the higher crime: *State v. Hornsby*, 8 Robt. 583; S. C., 41 Am. Dec. 314; *State v. Norvell*, 2 Yerg. 24; S. C., 24 Am. Dec. 458; *Jordan v. State*, 22 Ga. 545; *Barnett v. People*, 54 Ill. 325; *Brennan v. People*, 15 Id. 511, 517; *People v. Knapp*, 28 Mich. 112; *Hart v. State*, 25 Miss. 378; *Slaughter v. State*, 6 Humph. 410. So a conviction of a lower degree of murder is an acquittal of a higher degree: *Fields v. State*, 52 Ala. 348; *Smith v. State*, 68 Id. 424; *Lewis v. State*, 51 Ala. 1; *Johnson v. State*, 29 Ark. 31; *State v. Lessing*, 16 Minn. 75, 80; *State v. Ross*, 29 Mo. 32; *State v. Smith*, 53 Id. 139. A conviction of robbery in the first degree is an acquittal of the higher offense charged: *State v. Pitts*, 57 Id. 85. A conviction of grand larceny is an acquittal of the robbery charged: *Hickey v. State*, 23 Ind. 21. So of assault and battery and felony: *Canada v. Commonwealth*, 22 Gratt. 899; *Carpenter v. State*, 23 Ala. 84. A conviction of one offense charged is an acquittal of others charged in same indictment: *State v. Bruffey*, 75 Mo. 389; *Rix v. Heaps*, 2 Salk. 593. The defendant upon a charge of felony, being convicted of an attempt to commit felony, can not be tried for any other offense founded on same facts: *Regina v. Webster*, 9 L. C. 196. A minority of authority holds that if the verdict is set aside upon the defendant's motion the whole case is open for a new trial, in which he may be found guilty of the full offense charged in the first indictment: *State v. Beheimer*, 20 Ohio St. 572, 579; *United States v. Harding*, 1 Wall. jun. 147.

The second case rests upon the rule that prohibits the state from splitting the same offense into two or more offenses, different only in name. "The rule is well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once:" White, P. J., in *Simco v. State*, 9 Tex. App. 349. Accordingly, a conviction or acquittal of an offense that is a necessary element in and constitutes an essential part of another offense, both being in fact one transaction, is a bar

to a prosecution for the greater and including offense: *State v. Smith*, 43 Vt. 324, 328. The defendant can not be convicted of two distinct felonies growing out of the same act, when one is a necessary ingredient of the other, and if the state prosecutes the lesser offense to conviction, such conviction will be a bar to an indictment for the higher offense: *State v. Cooper*, 1 Green, 361; S. C., 25 Am. Dec. 490. Conviction of robbery is a bar to an indictment for an assault to commit murder, growing out of the same offense, as the assault or violence is a common element of both cases, and has been punished under the first indictment: *Wilcox v. State*, 6 Lea, 571; S. C., 40 Am. Rep. 53. A conviction or acquittal of such a less offense—an offense which is a mere subdivision of the greater offense committed at the same time—is a bar to a further prosecution of the greater offense: *Commonwealth v. Bright*, 78 Ky. 238; *Lohman v. People*, 1 N. Y. 379; S. C., 2 Barb. 216; *Regina v. Ebrington*, 9 Cox C. C. 86, 90; *Bank Prosecutions*, Russ. & Ry. 378. And this rule is sustained by the highest justice. For how baseless would be this salutary protection of an accused, the security from further prosecution for the same offense after he has been once in jeopardy, if he might be variously prosecuted, by simply charging the same offense a degree higher. On the other hand, every offense of the same generic class, that is, of the same nature, though varying in the degree of the offense growing out of the same transaction, must each contain the same common essential elements; and again, in establishing the less offense, all the circumstances of the transaction will be proved and the whole offense committed will be placed before the jury. An acquittal will, therefore, be, in effect, an acquittal of criminal liability in the whole transaction; while if the conviction is for a less offense than that really committed, yet the state is certainly the delinquent party. This principle is variously applied. Conviction or acquittal upon an indictment for an attempt to commit rape is a bar to an indictment for rape: *State v. Shepard*, 7 Conn. 54; *State v. Smith*, 43 Vt. 324, 328. A conviction of assault and battery is a bar to a subsequent indictment of assault and battery with intent to commit murder, the persons and assault being the same: *Moore v. State*, 15 Rep. 428; 71 Ala. 307; *Regina v. Walker*, 2 Moo. & R. 446. A conviction of assault is a bar to a subsequent prosecution for a battery committed at the same time: *State v. Chaffin*, 2 Swan, 493. Conviction of misdemeanor by court of competent jurisdiction is a bar to a prosecution of the felony perpetrated in the commission of the misdemeanor: *Murphy v. Commonwealth*, 23 Gratt. 960. So in the case of petit and grand larceny: *State v. Murray*, 55 Iowa, 530; *State v. Gleason*, 56 Id. 203; or larceny and burglary: *People v. Smith*, 57 Barb. 46. Where two indictments for felonious taking of goods were found against a prisoner, one charging him with burglary and larceny, and the other with robbery, and under the first indictment he was convicted of larceny, it was held that he could not be tried upon the second indictment: *State v. Lewis*, 2 Hawks, 98; S. C., 11 Am. Dec. 741. A prisoner who has been convicted of arson can not afterwards be tried on an indictment for murder for the commission of the same arson where the statute imposes the penalties of murder for such arson: *State v. Cooper*, 1 Green, 361; S. C., 25 Am. Dec. 490. In *State v. Hattabough*, 66 Ind. 223, it is held that a conviction or acquittal of the misdemeanor of assault and battery will not bar prosecution of the felony of assault and battery with intent to commit murder, but it will bar a conviction of the misdemeanor on the second indictment.

A minority of authority holds to the contrary of this proposition that the conviction or acquittal of the less offense will bar a prosecution of the greater. Of these authorities, Mr. Bishop says: "Some apparent authority, therefore,

English (2 Hawk. P. C., Curw. ed., p. 518, sec. 5; *Regina v. Button*, 11 Q. B. 929, 947, 948; 12 Jur. 1017; 1 Stark. Crim. Pl., 2d ed., 327) and American (*Scott v. United States*, Morris, 142; *Freeland v. People*, 16 Ill. 380), that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle:" 1 Bishop's Cr. Law, sec. 1057. See also, as holding with this minority of authority, *Thomas v. State*, 40 Tex. 36; *Severin v. People*, 37 Ill. 414; *Skidmore v. Bricker*, 77 Id. 164; *State v. Warner*, 14 Ind. 572; *Commonwealth v. Curtis*, 11 Pick. 134, 139; *contra*, *Regina v. Walker*, 2 Moo. & R. 446. The case of *State v. Foster*, 33 Iowa, 525, admits that a conviction or acquittal of manslaughter would bar a prosecution for murder.

DEATH RESULTING AFTER TRIAL FOR ASSAULT AND BATTERY, INDICTMENT FOR HOMICIDE LIES. This is a well-settled exception to the general rule as set forth above. If, after a conviction of assault and battery, the injuries inflicted resulted in death, the prisoner may be indicted for manslaughter or murder: *State v. Littlefield*, 70 Me. 452; *Burns v. People*, 1 Park. Cr. 182; *Stewart's Case*, 5 I. J. C. 310, 314; *Regina v. Morris*, L. R., 1 C. C., 90; *Commonwealth v. Evans*, 101 Mass. 25, 26. *Autrefois acquit* of wounding with intent to kill is no bar to indictment for murder if the wounded man afterwards die. For although the jury acquit of an intent to kill, this is no acquittal of murder, for murder may be committed without intent to kill if there be an intent to commit some other felony: *Regina v. Salvi*, 10 Cox C. C. 481, note.

OFFENSES AGAINST LIQUOR LAWS.—The same principles apply to this class of offenses, though perhaps the courts have enforced them a little more strictly. Liquor offenses must be identical that the plea may avail: *State v. Conlin*, 27 Vt. 318. Yet charging the same offense under another name does not permit a second prosecution: *State v. Layton*, 25 Iowa, 193. The same principle, that the facts charged in the second indictment must support the first, in order that the plea of former conviction or acquittal may avail, is here maintained: *State v. Birmingham*, Busb. L. 120; *State v. Revels*, Id. 200; *State v. Jesse*, 3 Dev. & B. L. 98. But each act of selling liquor without a license is a distinct offense: *State v. Andrews*, 27 Mo. 267; *Rex v. Taylor*, 5 Dow. & Ry. 422; S. C., 3 Barn. & Cress. 502. So of keeping a place for the sale of intoxicating liquors: *Gormley v. State*, 37 Ohio St. 120. And it is no bar to a prosecution for selling liquors without a license that for the same offense the defendant has been indicted and convicted upon the same charge since the date of the offense now charged. He must prove a conviction for the same act of selling: *State v. Ainsworth*, 11 Vt. 91. A repetition of the offense furnishes ground for a second indictment, and this may be laid upon the last day of the first indictment: *Commonwealth v. Connors*, 116 Mass. 35. But the second indictment must not cover any part of the time embraced in the first: *Commonwealth v. Robinson*, 126 Id. 259. Where the offenses charged in the two indictments are distinct, though committed concurrently, they are separately prosecutable. Conviction of the owner for keeping liquors with intent to sell is no bar to a prosecution against the liquors themselves as a nuisance and for the abatement of the nuisance: *Sanders v. State*, 2 Iowa, 230. Conviction of keeping a drinking-house and tippling-shop is no bar to indictment for presuming to be a common seller, though both indictments cover the same period of time and are supported by the same acts of illegal sale; for they are distinct offenses: *State v. Inness*, 53 Me. 536. Conviction for presuming to be a common seller of liquors within a specified period is no bar to a prosecution for a single act of selling such liquor within the same period. In the first case three sales were necessary to constitute the offense: *State v.*

Coombs, 32 Id. 529; *State v. Maher*, 35 Id. 225; *Commonwealth v. Hudson*, 14 Gray, 11, 12. Acquittal of being a common seller on the third of June is no bar to a prosecution for an unlawful sale on the second of June: *Commonwealth v. Keefe*, 7 Id. 332. But in *State v. Nutt*, 28 Vt. 598, 602, 603, it is held that a conviction of being a common seller of intoxicating liquors is a bar to a prosecution for single acts of sale previous to the filing of the complaint, for the several acts are constituent parts of one offense. Conviction of keeping a shop open on the Lord's day is no bar to a prosecution for keeping the same shop at the same time for the purpose of the illegal sale and keeping of intoxicating liquors: *Commonwealth v. Shea*, 14 Gray, 386. Conviction of maintaining a nuisance by keeping a building used for the unlawful sale and unlawful keeping of intoxicating liquors is no bar to an indictment for being a common seller of intoxicating liquors at the same time and place: *Commonwealth v. Lahy*, 8 Id. 459; *Commonwealth v. Bubser*, 14 Id. 83; or for keeping intoxicating liquors with intent to sell: *Commonwealth v. McCauley*, 105 Mass. 69; and *vice versa*: *Commonwealth v. Sheehan*, Id. 192; and see *Commonwealth v. Cutler*, 9 Allen, 486; *Commonwealth v. Welch*, 97 Mass. 593; *Commonwealth v. Hogan*, Id. 122. Setting up a gaming-table and keeping a gaming-table and inducing others to bet on it are distinct offenses: *Hinkle v. Commonwealth*, 4 Dana, 518.

ACQUITTAL OR CONVICTION WITH RESPECT TO SEVERAL DEFENDANTS.—A verdict of acquittal on an indictment charging four persons with the crime is a bar to a subsequent indictment charging three of them with the same crime: *Rex v. Parry*, 7 Car. & P. 836. *Autrefois acquit* in indictment against defendant in connection with others is good when he is afterwards indicted singly for the same offense: *Rex v. Dann*, 1 Moo. C. C. 424. But an acquittal of one of two co-defendants does not discharge the other: *State v. McClintock*, 1 G. Greene, 392; *Commonwealth v. McChord*, 2 Dana, 242; see *State v. Ross*, 20 Mo. 32. That one who has been acquitted or convicted as principal in a crime may be afterwards prosecuted as an accessory, is held in *State v. Larkin*, 49 N. H. 36; *Rex v. Plant*, 7 Car. & P. 575.

QUESTION OF SIMILARITY OF OFFENSES AT ISSUE ON PLEA OF AUTREFOIS ACQUIT OR CONVICT is for the jury: *Troy v. State*, 10 Tex. App. 319; *Prim v. State*, 41 Tex. 300; *Hile v. State*, 9 Yerg. 357. But where the facts are agreed upon, the court may instruct the jury that they constituted no former jeopardy: *State v. Pritchard*, 16 Nev. 101. And the court declares the legal effect of the record introduced to support the plea of *autrefois acquit*, and may instruct the jury that it does not support the plea if such is the case: *Martha v. State*, 26 Ala. 72.

CONVICTION, WHEN BARS PROSECUTION FOR PRIOR OFFENSES.—In *Crenshaw v. State*, 1 Mart. & Y. 122; S. C., 17 Am. Dec. 788, it is held that a conviction, judgment, and execution upon one indictment for a felony not capital is a bar to all other indictments for felonies not capital committed previous to such conviction. Mr. Bishop says that "this case follows the ancient doctrine of the English law, that a person once attainted of felony could not be prosecuted for another, but that this doctrine is not usually followed in this country, and has long ago been abolished in England by act of parliament:" Bishop's Cr. Law, sec. 1070. The subject is treated in a note to this case in this series.

DISTINCTION BETWEEN PLEAS OF AUTREFOIS ACQUIT AND CONVICT.—In *Simco v. State*, 9 Tex. App. 348, 349, White, P. J., draws a marked distinction between these pleas. He says: "There is a marked difference in modern

practice between the rules which govern the two pleas of *autrefois acquit* and *autrefois convict*, notwithstanding the immense amount of *dictum* and loose expression to the contrary found in the books. *Autrefois acquit* is only available in cases where the transaction is the same, and the two indictments are susceptible of and must be sustained by the same proof. These two elements must combine, and are both *sine qua non* to the sufficiency of the plea. *Autrefois convict* only requires that the transaction, or the facts constituting it, be the same. To illustrate: If a party be indicted separately for the theft of three horses, the property of A., B., and C., taken at the same time, or in one transaction, and he be tried on the first for the theft of A.'s horse, and the state fails from misnomer, or the defendant, by proving A.'s consent, should be acquitted, would the plea of that acquittal operate a bar to the conviction on the other trials because the transaction was one and the same? By no means. Why? Simply because the proof necessary to a conviction in the latter case would not convict in the former: *Albert Pickens v. The State*, 9 Tex. App. 270; Whart. Cr. Law, 6th ed., sec. 557, and authorities cited. But suppose the party was convicted of the theft of any one of the horses, would a plea of former conviction be a bar to a conviction on the other two indictments? Clearly so. And why? Because the transaction, the taking of the three horses at the same time, would constitute but one offense in law: *Wilson v. The State*, 45 Tex. 76; and the plea would be good upon the strength of and by virtue of another rule well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once: *Quinn v. The State*, 1 Tex. App. 47. Here is where the doctrine of carving would come in and support the plea: 1 Whart. Cr. Law, 6th ed., sec. 565, and authorities cited in the note."

The distinction here indicated seems to be that which we have treated under the head of "Variance." Any further distinction which may be gathered from the language of the learned judge we hesitate to accept. For suppose, in his second case, that the defendant, instead of being convicted, had been acquitted of stealing one of the horses, from the authorities cited above, and from the words of Judge White, we must conclude that the offense of stealing three horses would be nevertheless the same, and the acquittal of stealing one would be a bar to prosecutions of stealing the others. Suppose, however, a case where the several offenses arising out of the same transaction are distinct: here an acquittal of one of these offenses would not be a bar to a subsequent prosecution for the others; but, on the other hand, neither would a conviction. In fact, the learned judge in his first instance confines his example to a case of a variance; he says, "If the state fails from a misnomer." And if the defendant were acquitted by proving A.'s consent, this would also constitute a variance; that is, a misnomer of the owner of the horses stolen. However, if we accept the forceful and clear language of the judge as an indication of the tendency of the courts, we shall not go far wrong.

THE PRINCIPAL CASE IS CITED to the effect that a conviction on an indictment for burglary is a good plea in bar on a trial for robbery, if the circumstances of the robbery were put in proof in order to make out the case for which the prisoner was tried and convicted on the first indictment, in *Copenhagen v. State*, 15 Ga. 286. And the court say, in commenting upon its decision in the principal case: "We did not suppose, however, that it would have entered into any one's imagination to conceive that we had decided that because, as the case was presented, the robbery constituted a part of the burglary, necessarily the burglary formed a part of the robbery. This is

now in effect insisted on before us, and it is argued that, being acquitted of the robbery by effect of the former judgment of this court, the prisoner has been acquitted of the burglary." It is cited to the same effect in *Jones v. State*, 55 Id. 625; *Hudson v. State*, 9 Tex. App. 154. In *Holt v. State*, 38 Id. 190, it is cited to the effect that after an acquittal a party can not be indicted a second time for the same criminal acts, though under a different name; in *State v. Elder*, 65 Ind. 286, and *State v. Hattabough*, 66 Id. 241, as an authority upon the requisite similarity or identity of the two offenses charged in the two indictments.

SEPARATION OF JURY.—In *Neal v. State*, 64 Ga. 275, it is held that it was not an illegal or irregular separation of the jury for one of the jurors to retire, with leave of the court, and guarded by the bailiff, to attend to a call of nature, and the court, citing the principal case and other cases, said that the separation discussed by them was an improper separation, as distinguished from that under discussion. Separation of jury in criminal trial will, in general, invalidate the verdict: *Peiffer v. Commonwealth*, 53 Am. Dec. 606, and note, citing prior cases in this series.

INGRAM v. LITTLE.

[14 GEORGIA, 173.]

INSTRUMENT INCAPABLE OF HAVING ANY OPERATION, AND BEING NO DEED at time of its execution, can not afterwards become a deed by being completed and delivered in the absence of the party who executed it, by a stranger unauthorized by an instrument under seal.

DEED DULY EXECUTED, EXCEPT THAT NAME OF GRANTEE AND CONSIDERATION ARE NOT STATED, is inadmissible as a muniment of title, but is admissible to show color of title in the party claiming under it.

EXCEPTION TO TESTIMONY THAT IT WAS ILLEGAL WITHOUT SPECIFYING GROUND of illegality is not well taken.

DECLARATIONS OF PARTY IN POSSESSION OF LAND, and proved to be tenant, are not admissible against landlord without bringing home to the latter notice of them. With such notice they might go to show a repudiation of his tenancy, and a setting up of adverse possession and claim.

EJECTMENT by William G. Little against Bryan Ingram and others. The plaintiff introduced, in support of his claim, a deed from John B. Adair to himself. This deed was objected to on the ground stated in the opinion. The court admitted the deed and the testimony concerning it, and decided the deed to be valid as a part of the chain of title, and also to show color of title to support adverse possession. Joshua Tennison, the plaintiff's witness, testified to conversations between himself and Thomas Little, the father of the plaintiff, in which Thomas Little, who was in possession of the land, declared that he had no title himself, that his son, the plaintiff, intended to purchase the land, and subsequently asserted that the land belonged to

W. G. Little, the plaintiff, and professed to hold under him. This testimony was objected to on the ground that it was illegal. The claim of the defendants was under a sheriff's deed of the land which was proved to have been sold as the property of Thomas Little. The court charged the jury that the deed was, at least, color of title, and that if the jury were satisfied, from the evidence, that Thomas Little was in possession as tenant of the plaintiff continuously for seven years down to the date of the sheriff's sale, it would constitute a perfect statutory title in the plaintiff. It was urged by the defendants that Thomas Little, being the father of the plaintiff, his continuing so long in possession of the land after the purchase of it from Adair was a badge of fraud. Upon this point the instructions were that if Thomas Little were the vendor and W. G. Little the vendee of the land, either at a private or public sale, their relationship under the circumstances might be a badge of fraud. But if Thomas Little was a tenant of W. G. Little, and held in subordination to his title, and his possession was consistent with a fair and *bona fide* title in W. G. Little, no fraud could be inferred from their relationship. The defendants contended that the failure of W. G. Little to record his deed was an evidence of fraud. The court instructed that failing to record a deed is not *per se* evidence of fraud, and if it was recorded prior to the sheriff's sale, it was notice to the defendants of an outstanding title. The jury found for the plaintiff, and the defendant excepted. The case is otherwise sufficiently stated in the opinion.

Hunter, for the plaintiff in error.

S. and R. P. Hall, for the defendants in error.

By Court, NISBET, J. The great question in this case is upon the validity of the deed. It was duly signed, sealed, attested, and written out, except as to the name of the feoffee, the amount of the purchase money to be paid for the land, and some other things not material. In this condition it was taken by Mr. Anderson to Milledgeville, and there, in the presence of the purchaser, Mr. Little, he and the brother of the grantor, acting under a parol authority, filled out the blanks and delivered it. Subsequently, Adair, the feoffor, acknowledged, in presence of a witness sworn on the trial, that this document was his deed. Our opinion is, that as a muniment of title the deed is void, because the execution was consummated by filing the blanks by an agent in the absence of the feoffor, acting by

authority in parol. We put our decision upon authority, conceding that the books in England and in this country are in "distressing" conflict, and with some misgiving whether reason and common sense do not condemn it. This is, however, just the kind of case in which it is safest to be guided by the weight of authority. The rule, although a technical one, is single, clear, and easy of observance. If abrogated, the title to property might be left too much to the mistakes of memory, or to the corruptions of humanity. Under doubt, Marshall, C. J., with all his disrelish of technicalities, felt constrained to decide in the same way. We can well afford to follow when such a lawyer leads. I shall not go minutely into a discussion of the authorities. I shall only indicate the great landmarks of the question, and lay down the doctrine to which they guide. That doctrine is, that an instrument which when executed is incapable of having any operation, and is no deed, can not afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, unauthorized by an instrument under seal.

The deed in this case, before its completion and delivery, was inoperative, because made to no person. We say that it could not become a valid deed by filling the blank with the name of W. G. Little by Anderson, in the absence of Adair, who made it without authority under seal from him. The only case in England which sustains the contrary, in a like state of facts, is *Texira v. Evans*, cited in *Master v. Miller*, 1 Anst. 228, decided by Lord Mansfield. The books furnish no satisfactory report of it. It is questioned by Mr. Preston, in his edition of Sheppard's Touchstone, and in *Hibblewhite v. McMorine*, 6 Mee. & W. 213, 214, is declared not to be law, and overruled: Preston's Shep. Touch. 68.

The old writers are with this court in *Hibblewhite v. McMorine*. So also *Markham v. Gonaston*, Cro. Eliz. 626; S. C., Moore, 547; Com. Dig., Fait A, 1; *Weeks v. Maillardet*, 14 East, 568; *Powell v. Duff*, 3 Camp. 181; Bull. N. P. 167. To the same effect in the United States, see *Boyd v. Boyd*, 2 Nott & M. 125; *Perminster v. McDaniel*, 1 Hill (S. C.), 267 [26 Am. Dec. 179]; *Gilbert v. Anthony*, 1 Yerg. 69 [24 Am. Dec. 439]; *Byers v. McClanahan*, 6 Gill & J. 250; *Ayres v. Harness*, 1 Ohio, 368 [13 Am. Dec. 629]; *McKee v. Hicks*, 2 Dev. 379; *Harrison v. Tiernans*, 4 Rand. 177. See American authorities *contra*, in note to *Hibblewhite v. McMorine*, 6 Mee. & W. 215, 216. In *Hibblewhite v. McMorine*, Parke, B., reviews *Texira v. Evans*, and shows what are and

are not cases distinguishable from that. The case of *Hibblewhite v. McMorine* was decided in 1840.

We think it clear that the early and latest cases in England hold an authority under seal necessary. We can not err, therefore, in holding with them. We can not doubt as to what is the settled rule of the common law, and that is obligatory upon this court. This question was brought before Chief Justice Marshall in *United States v. Nelson*, 2 Brock. 64, and he ruled apparently with some doubt as to the reasonableness of his judgment, upon authority, in favor of the doctrine as I have stated it. He invoked an appeal by expressing the opinion that he would be reversed by the supreme court of the United States, but no appeal was taken. That immaterial blanks in a deed may be filled, upon parol authority, without invalidating it, we do not doubt. Our judgment extends only to the case made in this record. The court therefore erred in admitting this deed as a muniment of title; but we do not send the case back on that error, because it was admissible to show color of title under it; and as the plaintiff below must, in our judgment, recover on his statutory title, the cause ought not to go back. Although inadmissible to support title, we hold as the presiding judge held, that it is admissible as color of title.

The exception to the testimony of Tennison was that it was illegal. An exception so general brings no question before the presiding judge or before this court. Neither the bill of exceptions nor the assignment specifies the ground of illegality. We do not know why it was claimed to be illegal, nor upon what principle it was admitted. It does not appear but that if the objection now made to it in argument had been made in the court below it would have been sustained.

Our organic law requires the grounds of exception to be specified, that the opposing counsel may be notified, and this court informed of what is claimed to be error. If the exception had been well taken we should hold the testimony admissible. When the statements of Thomas Little were made the title of W. G. Little had not accrued. At that time Thomas Little claimed no title, and was in possession, therefore, as tenant to the true owner. His admissions that he had no title were admissible to explain the character of his possession, and for the same reason his admissions as to his tenancy under W. G. Little, after he bought the land, were admissible.

The court did not err in rejecting the testimony of Hobbs and Evans, who were introduced to prove the sayings of Thomas

Little, to the effect that W. G. Little bought the land for him at his request, and that he was the owner. The plaintiff below having proven that Thomas Little was in possession as tenant of W. G. Little, Thomas Little would not be permitted to deny the title of his landlord. His statement as to his own title certainly would not be evidence against his landlord without bringing home to him notice of them. With such notice they might go to show a repudiation of his tenancy and a setting up of adverse possession and claim.

The doctrine of registry and notice has no application to this case, and the court charged correctly as to fraud.

Let the judgment of the court below be affirmed.

AUTHORITY TO FILL BLANKS IN DEED CAN NOT BE GIVEN BY PAROL: *Williams v. Crutcher*, 35 Am. Dec. 422, and note citing prior cases; see *Ho's of Lamar v. Simpson*, 42 Id. 345, and note citing prior cases. The principal case is cited to this effect in *Pollard v. Gibbs*, 55 Ga. 46. In *Drumright v. Philpot*, 16 Id. 424, it was held that a prior authority, or a subsequent ratification not under seal, either express or implied, verbal or written, is sufficient to establish the deed of one partner as the deed of the firm, and binding upon it as such. Lumpkin, J., in delivering the opinion of the court, said: "It is not my present purpose to controvert the old rigid doctrine of the common law, which asserts that no prior authority or subsequent ratification, either verbal or by writing without seal, is sufficient to give validity to an instrument as the deed of a party. I yielded a reluctant assent to this threadbare technicality in *Ingram v. Little*;" and he decided the case on other grounds.

OBJECTIONS TO EVIDENCE MUST BE SPECIFIC: *Dickey v. Malechi*, 34 Am. Dec. 130. The principal case is cited to this effect in *Jackson v. Jackson*, 47 Ga. 116.

TENANT ESTOPPED TO DENY LANDLORD'S TITLE while the relation continues: *Heath v. Williams*, 43 Am. Dec. 265; *Whaley v. Whaley*, 40 Id. 594, citing prior cases in the note; *Tillotson v. Kennedy*, 39 Id. 330, and note; see *Farrow v. Edmundson*, 41 Id. 250, and note; *Givens v. Mullinax*, 55 Id. 706, and note citing prior cases; see also *James v. Patterson*, Id. 737.

COLOR OF TITLE, ENTRY UNDER, HOWEVER GROUNDLESS TITLE MAY BE, is sufficient, if *bona fide*, to constitute an adverse possession: *La Frombois v. Jackson*, 18 Am. Dec. 463; see *Tate v. Southard*, 14 Id. 578; *Kennebeck Purchase v. Laboree*, 11 Id. 79; *Jones v. Perry*, 30 Id. 430; *Ferguson v. Kennedy*, 14 Id. 761; *Shanks v. Lancaster*, 50 Id. 108; *Conyers v. Kenan*, 48 Id. 226.

GREER v. CALDWELL.

[14 GEORGIA, 207.]

PROMISSORY NOTES ARE NOT ADMISSIBLE IN EVIDENCE when no fact appears showing a connection between them and the transaction sought to be proved.

EVIDENCE OF AMOUNT PAID FOR HIRE OF NEGRO is admissible, if it tend to throw light upon an alleged usurious transaction, by showing that the principal and interest of the original debt had been paid by the hire.

REFUSAL TO ADMIT IRRELEVANT TESTIMONY AFTER PARTY HAS CLOSED HIS CASE is not erroneous.

BILL OF SALE ABSOLUTE IN FORM, EQUITY WILL GRANT RELIEF AGAINST, on the ground of fraud and mistake, when it appears that it was given as security for an usurious contract, and there is testimony of declarations of the usurer that he had only a lien on the property, and that the debtor might keep it if the principal and interest were paid; although it may be admitted that mere usury will not taint a bill of sale with fraud.

FRAUD OR MISTAKE MUST BE ESTABLISHED BY EVIDENCE SO CLEAR AND STRONG as to produce satisfactory conviction; slight suspicions, vague presumptions, bare possibilities, will not do; yet the evidence need not be positive.

GEORGIA STATUTE OF DECEMBER 25, 1837, was not intended to deprive courts of chancery of their authority to reform written contracts on the ground of mistake; but the object of the statute was to make plainly illegal the too common practice of allowing parol testimony to prove that a deed, absolute in its terms, was really intended as a mortgage, and this without pretense of fraud or mistake.

BILL in equity, in which the complainant was Allen H. Greer, executor of Milton Templeton, deceased, and the defendants were James S. Caldwell, the administrator *de bonis non* of the estate of John J. Hougabook, deceased, and Harriet his wife, who was the widow and formerly the administratrix of Hougabook. The bill prayed a discovery, relief, and an injunction. It appeared from the allegations of the bill that Hougabook loaned Templeton one hundred dollars, for which the latter gave several notes, all to become due in less than a year, and together amounting to one hundred and thirty-three dollars. After the maturity of these notes, Templeton took them up and substituted others to become due in less than a year, and amounting in all to two hundred and twenty-one dollars. After this Templeton borrowed a further sum of twenty-six dollars, and gave his note payable one day after date. A few days after this, Templeton executed and delivered to his creditor an absolute bill of sale of a negro, Benjamin by name. But this bill of sale, according to the allegations of this bill, was intended by the parties as a mortgage of the slave to secure the payment of the notes. The negro remained in the possession of Templeton, who paid to Hougabook the sum of eighty dollars yearly by way of interest, as the bill claimed; but the defendants maintained that this sum was the hire of the negro. After the death of Hougabook, and the marriage of his widow to Caldwell, the latter, who was now the administrator *de bonis non*, began an

action of trover against Templeton for the negro. During the pendency of this action Templeton died, and Greer became his executor. Verdict was for the plaintiff in the action of trover, and Greer appealed and filed this bill. He prayed an injunction of the action of trover, for the cancellation of the bill of sale, and for general relief. The answer admitted usurious interest on the loan. The question presented was whether there was sufficient proof of fraud or mistake to justify the interference of equity as prayed. The notes given for the hire of the negro were read in evidence. But the court refused to admit the notes given prior to the execution of the bill of sale, for the purpose of showing the usury of the whole transaction. The court also refused to permit counsel for the complainant to prove the value of the hire of the negro, commencing at the date of the bill of sale, for the purpose of showing that the principal and lawful interest of the debt—that is, the consideration expressed in the bill of sale, together with lawful interest—had been fully paid by this hire. The evidence introduced by the complainant and his grounds of error are fully stated in the opinion. After the complainant had closed his case, the defendant moved the court to dismiss the bill, on the ground that sufficient evidence had not been submitted to authorize the carrying the case to the jury. The motion was sustained, and the bill dismissed. The complainant excepted.

Warren and Robinson, for the plaintiff in error.

Miller and Hall, for the defendants in error.

By Court, STARNES, J. Complaint is made by the plaintiff in error that the court refused to admit the notes in the bill of exception named, and annexed to the bill as exhibits A, B, X, and D, for the purpose (as is alleged) of showing the usury.

We see nothing in the evidence proving a connection between the first set of notes, viz., the notes specified in schedules A and B (which are referred to as the notes first given by Templeton to Hougabook), and the usurious transaction of which complaint is made. The admitted amount of the debt from the former to the latter, viz., two hundred and forty-seven dollars, being the same with the amount of the notes in exhibits B and X, may have been relied upon as testimony to this effect; but this by itself is altogether too slight a circumstance to constitute such evidence. By itself, this did not authorize even a presumption. It might have served to hang a suspicion upon (and thus encourage a dispute before the jury, calculated only

to confuse them and embarrass justice), but such suspicion would not have been sufficiently definite and distinct to take the shape of a presumption on which a jury should act.

In the absence of such testimony, the notes offered were not relevant, and it was proper not to admit them.

The notes contained in exhibit D, given for the hire of the negro Ben, or Benjamin, were proper testimony, and should have been admitted. Together with the proof of hire which was offered, they would have served to show the amount paid on account of this transaction, and thus have aided in proof of the usury which is alleged.

For a similar reason, in our opinion, the court erred in rejecting proof of the hire which was paid by Templeton for this negro. Such testimony might have served to throw light upon the character of the transaction, by showing that the principal and interest of the original debt had been paid by the hire; especially when taken in connection with the testimony of Benjamin Harris, who swears that in the year 1845 Hougabook told him "that Templeton owed him some two or three hundred dollars, and that he had a lien on Templeton's negro," and "that the hire of the negro was in the place of interest." He also testified "that there was no dispute between the parties as to any other negro;" and that "the negro remained in the possession of Templeton to the time of his death, and never at any time went into the possession of Hougabook."

Plaintiff in error also complains that after he had closed his case, the court refused to allow testimony going to show that both the subscribing witnesses to the bill of sale were dead.

We think the court was right, for the reason (if for none other) that the testimony, so far as we can see, was neither relevant nor needed.

It is also assigned as error that the court dismissed the bill on the ground that there was not sufficient evidence to authorize a submission of the same to the jury, and because such evidence was not positive.

It was insisted in the argument before us that there was no fraud in the execution of the bill of sale, inasmuch as the usury can not be regarded as rendering the deed fraudulent, and that in the nature of the case there could have been no mistake.

It may be admitted as true that the usury proven can not be regarded as tainting the bill of sale with fraud, because the principal and lawful interest of the debt constituted a legal and sufficient consideration. But the usury may be fairly looked to

as characterizing what was done at the time this deed was made, as showing that an illegal and unjust bargain was obtained by Hougabook; and this, in connection with other circumstances, as we shall presently see, may serve to show fraud or mistake in the execution of the deed.

By the answers of Harris, we find Hougabook, in 1845, admitting, in effect, that Templeton owed him two or three hundred dollars only; that he had a lien on Templeton's negro, and that the hire of the negro was in the place of interest. If this testimony is to be received as credible, and it comes to us as entirely so, here is testimony strikingly inconsistent with the fact that there had been an absolute sale of the negro by Templeton to Hougabook; testimony out of the mouth of Hougabook himself.

John Strickland also testifies that in 1849, some two or three years before Hougabook's death, he had an interview with him, and "understanding that Hougabook had a mortgage on Templeton's negro," asked him "if he intended to close [foreclose] his mortgage on Templeton." He replied, "No; if Templeton would pay him his principal and interest, he might keep the negro." Here it will be observed that the witness in simple and direct terms puts a question to Hougabook, in which he refers to his mortgage upon this negro, and asks if he means to foreclose. Hougabook does not disclaim having a mortgage, and insists that he has an absolute bill of sale, as it is entirely probable he would have done if he had had such a deed rightfully; but on the contrary, by what he does say, he sanctions the idea that he had only a mortgage, or something of that kind, for he replies, "No; if he will pay me principal and interest, he may keep the negro."

He does not say, "I will resell the negro to him," in such event; but his words are, "he may keep the negro;" from which it may be fairly inferred that he was recognizing the legal title as still in Templeton.

Now, if we take this testimony of Harris and Strickland, with the admitted fact of the usury, and the attendant circumstances of the hard and unconscionable bargain driven by Hougabook, we can not hesitate to conclude that there was not only some but very strong evidence from which a jury might find that there was fraud or mistake in the execution of this instrument. That either tempted by cupidity, at the moment of its execution, Hougabook gave to the instrument which Templeton designed as a security the character of an absolute deed, or what is more

probable (and more charitable to the deceased), that from ignorance the instrument was thus executed, under the mistaken impression that with a verbal agreement between them Houghbook could hold it as security. The latter of these conclusions seems strongly supported by the testimony of Harris and Strickland.

If so, this is just such a case of mistake, growing out of misapprehension, or "want of foresight of the parties," as equity will interfere to correct: *Hollingshead v. McKenzie*, 8 Ga. 457.

Non videntur qui errant consentire is a rule of the civil law which has been adopted by our courts of equity; and acting upon it, they will relieve against the results of ignorance and error. Thus relieving, they will reform a written evidence of contract, if through misapprehension or mistake it should not express the intention of the parties; and parol testimony will be admitted to show such misapprehension or mistake: *Towers v. Moor*, 2 Vern. 98; *Langley v. Brown*, 2 Atk. 203; *Townshend v. Stangroom*, 6 Ves. 328; *Gordon v. Hertford*, 2 Mad. 120; *Garrard v. Grinling*, 2 Swans. 248; *Willan v. Willan*, 16 Ves. 82; *Wiser v. Blachly*, 1 Johns. Ch. 607; *Quick v. Stuyvesant*, 2 Paige, 84; *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559]; 1 Sug. Vend., 6th Am. ed., 257, 271; 1 Story's Eq. Jur., sec. 156; 1 Greenl. Ev. 296; *Blanchard v. Kenton*, 4 Bibb, 451; *Todd v. Rivers*, 1 Desau. 155; *Lindley v. Sharp*, 7 T. B. Mon. 252; *Murphy v. Trigg*, 1 Id. 72.

We think, also, that the court below was not entirely accurate in holding that the evidence offered to reform this deed should be positive, if he designed to use this term in its strictest sense.

We are not surprised that that court should have been slightly misled here; for the language used by some eminent judges when considering questions of mistake has been somewhat loose and indefinite, and sometimes encourages the view taken in this charge. For example, in *Burt v. Barlow*, 3 Bro. C. C. 451, we find Lord Thurlow requiring in such a case "distinct evidence of the mistake." "Express evidence" is said to be required for this purpose in some cases, as in *Henkle v. Royal Exch. Ass. Co.*, 1 Ves. sen. 317. In *Beaumont v. Bramley*, 1 Turn. & R. 41, it was held that such proof must be "strong, irrefragable." On the other hand, that great man, Lord Hardwicke, held that in such case "a reasonable presumption was sufficient:" *Simpson v. Vaughan*, 2 Atk. 31.

The true and reasonable rule, we think, is that which will be found sanctioned by Chancellor Kent, viz., that the proof in

such a case must be clear, strong, and satisfactory: *Boyd v. McLean*, 1 Johns. Ch. 590; *Gillespie v. Moon*, 2 Id. 585 [7 Am. Dec. 559]. Slight suspicions, vague presumptions, bare possibilities, will not do; but the evidence must be such, and so clear and strong, as to produce satisfactory conviction.

This is all that is required, and this is enough to prevent such admission of parol evidence from producing insecurity in written titles.

A few words should perhaps be added in relation to the statute of December 25, 1837. It would seem, by the charge of the court, to have been his opinion that by the operation of this statute a bill of sale, absolute in its face, can be attacked by parol testimony, on the ground of fraud alone. Such is not the view we take of this statute. In our opinion, it was not intended to deprive our courts of chancery of their authority to reform written contracts on the ground of mistake. But the object of the statute was by express enactment to make plainly illegal the too common practice of allowing parol testimony to prove that a deed, absolute in its terms, was really intended as a mortgage; and this without pretense of fraud or mistake. In other words, the statute is not restrictive of the law as it previously stood, but only declaratory thereof.

Let the judgment be reversed.

CONTRACT IS NOT VOID FOR USURY, and the principal sum and legal interest thereon may be recovered: *Planters' Bank v. Sharp*, 43 Am. Dec. 470, and note.

USE OF SLAVE GIVEN FOR INTEREST ON MONEY may make the contract usurious: *Reynolds v. Carter*, 37 Am. Dec. 642.

JURISDICTION OF EQUITY TO REFORM MISTAKE IN INSTRUMENT: See *Lettsendorfer v. Delphy*, 55 Am. Dec. 137, and note citing prior cases.

FRAUD WILL NOT BE PRESUMED, BUT MUST BE ESTABLISHED BY PROOF: *Juan v. Toulmin*, 44 Am. Dec. 448, and note citing prior cases.

FLOYD v. COMMISSIONERS OF EATONTON.

[14 GEORGIA, 354.]

STATUTE GRANTING TO COMMISSIONERS OF TOWN POWER TO ISSUE LIQUOR LICENSES, under such regulations as they might prescribe, provided that the applicant be required to take the oath required by the general law of the state, gives full and complete authority to the commissioners to prescribe any and whatsoever legal and constitutional regulations they please, subject to which such license should be granted, provided the oath specified was administered; and therefore they are authorized to pre-

scribe as an additional regulation that the clerk of the applicant shall take a similar oath.

VIOLATIONS OF ORDINANCE OF MUNICIPAL CORPORATION, not embraced in the elemental definition of crimes as recognized by the penal statutes, are not criminal cases included in the provision of the state constitution that the superior courts shall have exclusive jurisdiction in all criminal cases, except in the cases that are therein specified; and therefore a statute authorizing a municipal corporation to impose a penalty for such violation is constitutional.

ENFORCEMENT OF MUNICIPAL BY-LAWS, AND INFLICTION OF FINES thereunder without the intervention of a jury, is not in conflict with the provision of the state constitution securing the trial by jury, "as heretofore used in this state," because such right was not claimed for or accorded to offenders in such cases before the adoption of the state constitution.

CERTIORARI on a case stated. Under the legislative act set forth in the opinion, which was an amendment of the charter of the town of Eatonton, the commissioners passed an ordinance providing that the clerk or assistant of any applicant for a liquor license should take the same oath as that required from the applicant. And upon failure in this respect it was provided that the license should be forfeited and a penalty of twenty-five dollars should be imposed for retailing within the town without a license. The commissioners granted a liquor license to Thomas Floyd, which was forfeited afterwards, he having employed a clerk that had not taken the prescribed oath. Floyd continued the business of retailing liquors after the forfeiture of his license until the fines imposed upon him aggregated the amount of three hundred dollars. The questions at issue on this agreed statement were by agreement submitted on argument to the presiding judge of the superior court for decision, with leave to either party to sue out a writ of error to his decision. The authority of the commissioners to impose the fines was sustained, and Floyd assigned error: 1. That the commissioners had no authority to require an oath of the clerk or assistant; 2. That the authorization of the commissioners to pass ordinances and impose penalties for their violation was unconstitutional; 3. That the defendant was deprived of the right of trial by jury.

Hudson, for the plaintiff in error.

Adams, for the defendant in error.

By Court, STARNES, J. When, by the act of January 22, 1852, the legislature granted to the commissioners of the town of Eatonton the power to issue licenses for the retail of spirituous liquors within the corporate limits of that town, under such

regulations as the commissioners might prescribe, provided that the applicant should be required to take the oath required by the general law of the state, full and complete authority was given to the commissioners to prescribe any and whatsoever legal and constitutional regulations they pleased, subject to which such license should be granted; provided they were careful, as one of these regulations, to have the oath specified administered to the applicant.

That provision was not to be considered as a sort of measure of maximum of terms, on which they were to regulate the grant of license, but, as it were, a minimum of regulation. That is to say, on no less terms should the license be granted; and as many other terms or regulations might be prescribed by them as they should deem expedient and proper.

When, therefore, these officers, in the discharge of their duty, prescribed as a regulation that the clerk of the applicant also should take a similar oath, they did what they had full power and authority to do by legislative grant; and they did that which we think was expedient and judicious.

We are making no departure from a strict construction of this act in so holding. No other construction, we think, can reasonably be put upon the plain signification of the words used in the statute.

This act is not in conflict with the first section of the third article of our state constitution, which provides that the superior courts shall have exclusive jurisdiction in all criminal cases, except in the cases which are therein specified.

The "criminal cases" to which reference is here made are violations of the public laws of the state, and not the local by-laws or police regulations of a town or city, which are not embraced in the elemental definitions of crimes, as recognized by our penal laws. So this court has decided in the case of *Williams v. City Council of Augusta*, 4 Ga. 509.

The offenses for which the defendant was fined by the commissioners were not violations of our penal code; for it is unfortunately true, and so we have held in another case, at one of our recent sessions, that the language of the code on this subject is such as to exempt from punishment under its provisions any person who retails without a license in corporate towns or cities having authority to grant such license.

The twenty-seventh section of the tenth division of the penal code provides that any person retailing spirituous liquors, etc., without a license from the inferior court, etc., except in corpo-

rate towns or cities where by law the corporate authorities are authorized and empowered to grant such license, shall be guilty of a misdemeanor, etc.

It will be perceived that this exception operates to exempt from the penalties prescribed all persons retailing without a license in a corporate town whose authorities are empowered to grant such license.

It may not have been the intention of the law-maker to give such effect to this section; or it may really have been intended to leave the matter of punishment, in such cases, in the hands of the corporate authorities having power to grant the license. However this may have been, as the matter now stands (there being no other provision of our penal code on the subject), there is no law of the state making penal the retailing of spirituous liquors without a license in a corporate town having authority to license retailers; and we think that legislative action is needed in order that such retailers without license in corporate towns, as everywhere else in our state, shall in plain and distinct terms be subjected to punishment under our code, or by ordinance of such town or city; and we will take the necessary steps to have this matter brought to the early attention of the legislature.

It is plain from what we have said that the act of 1852, as our law is now written, is not unconstitutional, because that the offenses in question were not in violation of a public law, and therefore not "criminal cases" in the sense of the term as used in our constitution.

Neither was the proceeding in this case unconstitutional because contrary to the fifth section of the fourth article of our constitution, which declares "that trial by jury, as heretofore used in this state, shall remain inviolate."

Our reason for so holding is the same which will be found to have been given in the case before cited, of *Williams v. City Council of Augusta*, and is as follows: The right of trial by jury, as existing in this state before the adoption of the constitution, has not been violated, because such right was not claimed for or accorded to offenders in such cases before that time.

Though this right was guaranteed to Englishmen by Magna Charta, and ever regarded in England as one of the great pillars of their constitution, yet in that country municipal corporations for centuries have enforced their by-laws and inflicted fines without the intervention of a jury. So, too, in this state similar corporations, before the adoption of our constitution, will be

found to have tried and determined such cases in the same summary way.

From these things, we conclude that the right of trial by jury, as it was claimed, accorded, and exercised in the state previous to the thirtieth of May, 1798, was not violated in these cases by the proceedings of the town commissioners of Eatonton.

Let the judgment be affirmed.

POWER GRANTED TO MUNICIPAL CORPORATION carries with it power to impose and enforce penalties: *Mayor of Mobile v. Yuille*, 36 Am. Dec. 441; *City of Cincinnati v. Bryson*, 45 Id. 593. But the enforcement of the penalty must not be without trial in due course of law: *Rost v. Mayor*, 35 Id. 186. See also *Thomas v. Schermerhorn*, 55 Id. 385, and note.

GENERAL LIMITATIONS ON POWER OF MUNICIPAL CORPORATIONS TO PASS ORDINANCES: See this subject discussed at length in the note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 625, 627.

THE PRINCIPAL CASE IS CITED in *Mayor v. Conly*, 32 Ga. 214, to the effect that where by law the corporate authorities are empowered to grant license, the jurisdiction of the state over it is withdrawn. In *McRea v. Mayor etc.*, 59 Id. 171, the principal case is referred to. This case decided that a prior conviction in a state court would not protect the accused from further prosecution for the same act in a municipal police court under a municipal ordinance.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

BRADLEY v. SNYDER.

[14 ILLINOIS, 263.]

GRANTEE OF EQUITY OF REDEMPTION HAS RIGHT TO REDEEM, notwithstanding a foreclosure and sale, when he was not made a party to the foreclosure proceedings; and it matters nothing to the mortgagee or those claiming under the mortgage, whether the conveyance of the equity of redemption was voluntary or even fraudulent as to creditors.

LIEN OF MORTGAGE IS NOT EXHAUSTED BY FORECLOSURE AND SALE OF MORTGAGED PREMISES: when the owners of the equity of redemption seek to redeem, it is from the mortgage and not from the sale under it.

GRANTEE OF EQUITY OF REDEMPTION MUST PAY BALANCE DUE UPON MORTGAGE AFTER SALE UNDER FORECLOSURE, as well as the purchase money, in order to redeem, unless the mortgagor has paid such balance.

PURCHASER UNDER FORECLOSURE SALE WILL BE ALLOWED FOR IMPROVEMENTS made by him upon the premises, less the rents and profits which he has enjoyed, upon redemption, where he not only supposed he had a good title and made the improvements in good faith, but the redemptioner stood by seeing the expenditures, and maintaining the profoundest silence as to his right to redeem.

MARRIED WOMAN'S SILENCE MAY PREJUDICE HER RIGHTS.

PENALTY FOR NOT PAYING SCHOOL MONEY LOANED WHEN DUE, provided by the Illinois school laws, is imposed only on the borrower, is not assignable, and is not a part of the contract contained in the bond or mortgage given to secure the money loaned, and must be enforced by a special count.

BILL to redeem. The bill alleged that one Elias Thompson, who had been the owner of a certain tract of land, had mortgaged it to the school commissioner to secure the payment of two hundred and seventy-five dollars, with interest; that after the mortgage had been recorded, Thompson, in consideration of

one thousand dollars, conveyed the land to his daughter, the complainant, who afterwards intermarried with the complainant Bradley; and that the mortgage was thereafter foreclosed, and the premises sold, the complainants not being parties to nor having notice of the proceedings. The bill also alleged that other conveyances following the foreclosure had been made, in each of which it appeared, as with the sale on foreclosure, the consideration was less than the amount due on the mortgage; and that the subsequent purchasers had occupied the land and received the rents and profits. The answer, after admitting the making of the mortgage, the foreclosure and sale, and the conveyances following, alleged that the complainants had notice of the foreclosure and sale; that valuable improvements had been made by the subsequent purchasers, who were ignorant of the complainants' claim, and that the complainants had knowledge of the making of the improvements, but did not assert their right; and that the conveyance from Thompson to his daughter was fraudulent and without consideration. Proofs were taken, and it was decreed that the plaintiffs had a right to redeem by paying on a day named a certain sum for the benefit of certain defendants, for the value of the improvements and the principal and interest on the mortgage. The money not having been paid as required by the decree, the bill was dismissed. The complainants appealed.

O. Peters and S. Ramsey, for the appellants.

N. H. Purple, for the appellees.

By Court, CATON, J. There can be no doubt about the right of the complainants to redeem the premises from the mortgage under which the defendants in possession claim title from the purchaser under the proceedings to foreclose the mortgage. They took from the mortgagor a conveyance of the equity of redemption, and claimed to hold subject to the mortgage. It can matter nothing to the mortgagees or those claiming under the mortgage whether the conveyance of the equity of redemption was voluntary or even fraudulent as to creditors. So long as the conveyance was subject to the mortgage, it could not be fraudulent as to them. So long as the lien of the mortgage was recognized and secured, it was no business of the mortgagees whether Thompson continued to hold the equity of redemption or gave it to his daughter, or what became of it. The conveyance of the equity of redemption by Thompson to his daughter, and her subsequent marriage, made the present complainants

necessary parties to the foreclosure proceedings, and as they were not made parties, they are not bound by the decree of foreclosure or the sale made under it. Notwithstanding the foreclosure, they have still a perfect right to redeem, as complete and absolute as if no foreclosure had ever been had.

The principal question is, When they apply to a court of equity for the enforcement of this right, upon what terms shall they be allowed to exercise it?

It was insisted upon the argument that as the premises did not sell for the amount due upon the mortgage, and that as by the foreclosure and sale the mortgage, even for the residue, ceased to be a lien upon the premises in the hands of the purchaser, the complainants were only bound to pay the amount for which the premises sold. That as a lien upon the land, the force of the mortgage was spent when the premises had been sold under it, and their value realized and applied in extinguishment of the mortgage; that the lien was exhausted and the connection between the mortgage and the incumbered premises completely severed. The answer to the suggestion is simply this: that the law is otherwise. When the owners of the equity of redemption come into court and seek to redeem, the application is not only in form but in substance to redeem from the mortgage, and not from the sale under the mortgage. They are bound by the mortgage, and not by the sale, to which they were strangers, by reason of their not having been made parties to the proceedings of foreclosure.

If they were to redeem from the sale, and not from the mortgage, they must pay the amount of the purchase money, whether that be greater or less than the amount due upon the mortgage. If they may say the purchaser is made whole by receiving the money which he paid for the premises, where the amount was less than that due upon the mortgage, he on the other hand may say that the complainant shall make him whole by paying the full amount paid at the sale, although it exceed the sum due upon the mortgage. But for the subsequent assignment of the mortgage by the mortgagee to the purchaser, which was done in this case, the purchaser, it is true, would have only had an interest in the redemption money to the amount which he had paid for the premises, and the balance of the redemption money would have gone to the mortgagee in satisfaction of the balance of the amount due upon the mortgage. In the case of *Benedict v. Gilman*, 4 Paige, 58, which is precisely analogous to this in principle, the law upon this question is laid down by the chan-

cellor. The only difference between that case and this is, that the parties claiming the right to redeem were judgment creditors instead of the assignees of the equity of redemption, and the foreclosure was a proceeding under the statute of New York, to which the judgment creditors were not and could not be made parties, and hence did not bar their right to redeem: *Vroom v. Ditmas*, Id. 526. The statutory foreclosure there had the same effect as did this foreclosure here. The purchaser filed his bill against the judgment creditors to compel them to redeem or to bar their right to do so. Gilman was the assignee of the judgments, and claimed the right to redeem by the payment simply of the amount which the purchaser had paid, which was much less than the amount due upon the mortgage. The chancellor said: "The defendant Gilman is also under a mistake in supposing he has a right to redeem the mortgaged premises upon payment only of the sum for which they were sold, and that he is not bound to pay the whole sum actually due on the bonds and mortgages. Under a statute foreclosure, if there are judgments subsequent to the mortgage which remain a lien upon the property at the time of the sale under the statute, the purchaser takes the whole legal and equitable interest in the property, as against the mortgagor and all persons claiming under him; subject, however, to the equitable right of the judgment creditors to redeem in the same manner as if such foreclosure had not taken place. The amount which such judgment creditors are to pay upon the redemption of the premises does not depend upon the sum bid at the sale, but is regulated by the amount actually due at the time of such sale, unless it has been subsequently paid by the person who was equitably bound to pay the same." So here, unless Thompson, the mortgagor, has paid the balance due upon the mortgage after the sale, the present complainants must pay it as well as the purchase money, in order to redeem, except the costs of the foreclosure, for which they are not responsible, for they were not parties.

In this case, also, we think the complainants are bound to allow the purchaser the value of the permanent improvements which he has placed upon the premises, less the rents and profits which he has enjoyed. On this point, also, the case of *Benedict v. Gilman*, *supra*, is an authority directly applicable, while the facts of the case before us are much stronger in support of the claim for improvements than were those of the case referred to. In that case the improvements were made by the purchaser under the belief that his title was good; but there is no intima-

tion that the party claiming the right to redeem encouraged the purchaser in making them, even by his silence, or that he ever knew they were being made. The only claim for their allowance was that they were made in good faith. And the chancellor says: "Under such circumstances, it would be inequitable and unjust to give the defendants the benefit of those improvements without compelling them to pay an equivalent therefor."

The case at bar goes further: here the purchaser not only supposed he had a good title and made the improvements in good faith, but the complainants stood by for years, and saw the purchaser expending his money and labor in improving the premises, all the while maintaining the profoundest silence to the purchaser as to their right to redeem. This, if not a legal fraud, is such conduct as this court can never reward by allowing the complainants to avail themselves of the benefits of the improvements without compelling them to pay a just compensation therefor. This notice of the progress of the improvements, and silence of the parties, places this case on the highest grounds of equity and good conscience. It was objected, however, that the equity of redemption belonged to the wife, and that her silence should not prejudice her rights. In other words, that when a woman gets married she obtains a license to commit a fraud. Such is not and ought not to be the law: 1 Story's Eq. Jur., sec. 385. We are of opinion that the purchaser is to be allowed payment for his improvements, and that the complainants should only be allowed to redeem upon paying a just equivalent for them; that is, the increased value of the premises arising from the permanent improvements made thereon by the purchaser, deducting therefrom the rents and profits of the premises since he took possession under his purchase: *Benedict v. Gilman, supra*.

The circuit court, however, very clearly erred in charging the complainants with the twenty per cent penalty imposed by our school laws for not paying money loaned of the school fund at the time it becomes due. In the first place, the complainants are not liable for the penalty in any form of action; but it is by the statute imposed upon Thompson, who borrowed the money and executed the mortgage. Again, this penalty, we are of opinion, is not assignable, but is given to the school fund alone. But above all, the penalty could not be enforced in this form of proceeding, even were this a bill filed by the mortgagor against the mortgagee in possession to redeem from the mortgage. This

penalty is given by the statute for wrongfully withholding money due the school fund, and is not a part of the contract contained in the bond or mortgage given to secure the money loaned. It can not be recovered upon an ordinary declaration counting upon the contract, but a special count is required, claiming the penalty as given by the statute: *Hamillon v. Wright*, 1 Scam. 582. In that case the court said: "The declaration is in the usual form of debt, and contains no claim for twenty per cent damages in case of failure to pay the principal or interest. The instructions were properly refused. The twenty per cent is given as a penalty, and it can not be recovered unless the plaintiff claims it in his declaration." Had this bill been filed by the purchaser against the present complainants to foreclose their equity of redemption, there would have been as much propriety in their setting up in their answer, as a set-off against the amount due upon the mortgage, a claim for the penalty which is given by our statute for cutting trees upon the premises, or any other penalty given by the statute for acts done upon the land or otherwise connected with the subject-matter of the suit.

The complainants are entitled to redeem upon paying the amount due upon the mortgage and the value of the improvements as above indicated.

The decree of the circuit court must be reversed and the suit remanded, with directions for further proceedings conformable to the views of this court.

Decree reversed.

TRUMBULL, J., not sitting.

GRANTEE OF EQUITY OF REDEMPTION HAS RIGHT TO REDEEM when he has not been made a party to the suit for foreclosure: *Frische v. Kramer's Lessee*, 47 Am. Dec. 368.

OWNER OF LAND IS ESTOPPED FROM SETTING UP RIGHT when he knowingly and silently permits another to make expenditures upon the land, under a mistaken impression as to title: *Godeffroy v. Caldwell*, 56 Am. Dec. 360, and prior cases in the note thereto; *Henderson v. Overton*, 24 Id. 492.

MARRIED WOMAN, WHEN ESTOPPED.—When by her covenants: *Jackson v. Vanderheyden*, 8 Am. Dec. 378; *Martin v. Dwelly*, 21 Id. 245; *Wadleigh v. Glines*, 23 Id. 705; *Lessee of Hill v. West*, 31 Id. 442; *Nash v. Spofford*, 43 Id. 425, and note considering the question. When from asserting any claim in hostility to her husband's will: *Benedict v. Montgomery*, 42 Id. 230.

EFFECT ON LIEN OF MORTGAGE OF SALE UNDER IT.—It has been laid down in general terms that when a mortgage is satisfied by a sale under it, the lien is extinguished: *People v. Beebe*, 1 Barb. 379; and see 2 Jones on Mort., sec. 936; and this rule is substantially adopted by the California civil code, sec.

2910. See in this connection Freeman on Judgments, sec. 398, on the effect of a judgment of foreclosure as a merger or extinguishment of the mortgage lien. If, however, the proceedings in the foreclosure suit be vacated, the judgment and sale do not cancel the mortgage, but the lien remains, and may be enforced by new proceedings: *Stackpole v. Robbins*, 47 Barb. 212; S. C. on appeal, 48 N. Y. 665. But the question may arise, as in the principal case, between a purchaser under the mortgage sale and the holder of a subsequent lien claiming the right to redeem: Is the lien of the mortgage spent for all purposes when the mortgaged premises have been sold under it? If the lien is exhausted, and the connection between the mortgage and the mortgaged premises completely severed, then the holder of a subsequent lien, who has a right to redeem, may redeem from the sale; otherwise he must redeem from the mortgage, and the amount of redemption money which he will be obliged to pay will depend upon the terms of the mortgage, and not upon the amount paid at the sale. It is universally held, in accordance with the principal case, that independent of statutes to the contrary, a person seeking to redeem property sold under a mortgage for less than the amount due upon it must pay or tender the whole of the mortgage debt, unless, perhaps, the balance due at the time of the sale has been paid by the person equitably bound to pay the same: *Benedict v. Gilman*, 4 Paige, 58; *Vroom v. Ditmas*, Id. 526, 531; *Gage v. Brewster*, 31 N. Y. 218; *Collins v. Riggs*, 13 Wall. 491; *Baker v. Pierson*, 6 Mich. 522; *Powers v. Golden Lumber Co.*, 43 Id. 468; *Hosford v. Johnson*, 74 Ind. 479; *Knowles v. Rablin*, 20 Iowa, 101; *Johnson v. Harmon*, 19 Id. 56; *Stoddard v. Forbes*, 13 Id. 296, 300; *White v. Hampton*, Id. 259, 264; *Martin v. Fridley*, 23 Minn. 13; the three last cases citing the principal case to this point. The theory is, that the lien as to the subsequent incumbrancer is not exhausted by the sale. Bradley, J., in *Collins v. Riggs*, *supra*, thus states the rule: "To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed, and is still in existence; therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser in equitable proportions, so as to reimburse the latter his purchase money and pay the former the balance of his debt." In *White v. Hampton*, *supra*, the court say: "To redeem, it is not sufficient to pay the amount of the sale, nor any other sum less than actually due the prior incumbrancer. Under such a bill [bill to redeem], the lien is not exhausted nor satisfied by a sale of the premises." Again, in *Martin v. Fridley*, *supra*, Gilfillan, C. J., in speaking of the foreclosure by the senior incumbrancers, and of the right of the plaintiff, a junior incumbrancer, to redeem, says: "Upon the expiration of the time to redeem from their foreclosure they became the absolute owners of the property, subject to the plaintiff's right of redemption under his mortgage. Except as to his right of redemption, there was a complete merger and union of their mortgage interest and the fee. This merger and union was prevented as to him only so far as was necessary to preserve his right to redeem, and to prevent the extinction of their mortgage interest as against such right to redeem. But even as against that right, the character of their mortgage interest was changed. The foreclosure extinguished the debt, so far as it affected the land, and the mortgage interest was no longer only a lien to secure and a mere incident to the debt. Had he redeemed, he would have been entitled by such redemption to be subrogated, not to a mere lien to secure the debt, and the right to enforce such lien as though no foreclosure had been made,

but to the interest in the land which their mortgage and its foreclosure gave them. That interest was the entire title, subject to his right of subrogation to it by redemption, and subject, probably, to be affected by failure to make the foreclosure absolute as to him within the proper time." Where a statute, however, provides for a redemption from the sale, payment of the mortgage debt is not required, but of the amount bid at the sale, with interest: *Seligman v. Laubheimer*, 58 Ill. 124, 126; *Lloyd v. Karnes*, 45 Id. 62, 68. These cases distinguished the principal case on the ground that the redemptioners therein were not exercising a strictly statutory right. See also *Swearingen v. Roberts*, 12 Neb. 333, holding the same rule; Cal. C. C. P., sec. 702.

It may be well to notice in this connection the effect of a sale of the mortgaged premises in satisfaction of one of several installments secured thereby. It is generally held that a foreclosure and sale for an installment due exhausts the lien of the mortgage, and the same land will not be subject to a second sale to satisfy a subsequent installment: *Escher v. Slimmons*, 54 Iowa, 269; *Poweshiek County v. Dennison*, 36 Id. 244; *Fowler v. Johnson*, 26 Minn. 338; *Standish v. Vosberg*, 27 Id. 175; *Smith v. Smith*, 32 Ill. 198; *Rains v. Mann*, 68 Id. 264; *Grattan v. Wiggins*, 23 Cal. 16; but see *McDougal v. Downey*, 45 Id. 165. The contrary is held in Michigan, and if a mortgage is there foreclosed for an installment only, it remains in force as to subsequent installments: *Bridgeman v. Johnson*, 44 Mich. 491; *McCurdy v. Clark*, 27 Id. 445; *Miles v. Skinner*, 42 Id. 181; although the rule was different, and as first above given, under a former statute: *Kimmel v. Willard's Adm'rs*, 1 Dougl. 217; and under a prior statute of Minnesota a sale under a power to satisfy one installment left the lien of the mortgage for subsequent installments unimpaired: *Watkins v. Hackett*, 20 Minn. 106. Under the first rule, also, a foreclosure sale, which, before it becomes complete by the expiration of the time allowed for redemption, is annulled by the owner of the real estate redeeming, does not affect the lien of the mortgage for the other installments of the mortgage debt: *Standish v. Vosberg*, 27 Id. 175.

SPANGLER v. JACOBY.

[14 ILLINOIS, 297.]

MAJORITY OF ALL MEMBERS ELECTED TO EITHER BRANCH OF GENERAL ASSEMBLY MUST CONCUR IN FINAL PASSAGE OF BILL, under the constitution of Illinois, in order that it shall become a law.

VOTE MUST BE TAKEN BY AYES AND NOES AND ENTERED ON JOURNAL, under the Illinois constitution, on the final passage of a bill by either branch of the general assembly.

PRINTED STATUTE BOOK IS NOT CONCLUSIVE EVIDENCE OF ACTS CONTAINED THEREIN, but may be corrected by the original acts on file in the office of the secretary of state. *Per Treat, C. J.*

JOURNALS OF EITHER BRANCH OF LEGISLATURE MAY BE APPEALED TO to show that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether.

SIGNATURES OF SPEAKERS AND EXECUTIVE TO ACT ARE PRESUMPTIVE BUT NOT CONCLUSIVE EVIDENCE of the passage of a law; and this presumption may be overcome by the journals

MOTION to quash a summons because it was made returnable on the first Monday in May, 1853, on the first day of the term of the McDonough circuit court, when no term of said court was authorized by law. By the agreed case it appeared that the times fixed for holding the McDonough circuit court had been the third Mondays in April and November of each year; but at the next preceding session of the legislature a bill was introduced in the senate providing that the times of holding the court should thereafter be on the first Mondays in May and September. The bill passed the senate, was reported to the house of representatives, where it was amended, and sent to the senate for its concurrence, without, however, having been read a third time in the house, so far as was shown by the journal of the latter. The senate concurred in the amendment and passed the bill; and the bill was signed by the speakers of the two houses and by the executive. A certified copy of the journals of both houses relating to the act in question appeared in the bill of exceptions. The motion was overruled and judgment given for the plaintiff, to which the defendant excepted and sued out this writ of error.

R. S. Blackwell, for the plaintiff in error.

N. H. Purple and B. C. Cook, for the defendant in error.

By Court, *TREAT*, C. J. The constitution contains the following provisions: "Each house shall keep a journal of its proceedings:" Art. 3, sec. 13. "On the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house:" Art. 3, sec. 21. "Every bill, having passed both houses, shall be signed by the speakers of their respective houses:" Art. 3, sec. 23. "Every bill which shall have passed the senate and house of representatives shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it:" Art. 4, sec. 21.

A majority of all the members elected to either branch of the general assembly must concur in the final passage of a bill. This is indispensable to its becoming a law. Without it the act has no more force than the paper upon which it is written. The vote must be taken by ayes and noes. The constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The vote must also be entered on the journal. The office of the journal is to record the proceedings of the house, and authen-

ticate and preserve the same. It must appear on the face of the journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law, and can not be dispensed with by the legislature. There are some other requirements equally essential, and that can no more be disregarded. A bill must be signed by the speakers of both houses, and then presented to the governor for his action. If he consents, his approval is indorsed on the bill; if he returns it with objections, it must again be passed through each house by a majority of all its members. If he does not return the bill within ten days, and the legislature still remains in session, it becomes a law without his signature.

When an act has gone through all the forms of legislation, it is deposited in the office of the secretary of state: R. S., c. 96, sec. 7. The journals of the two houses take the same direction: Id., c. 96, sec. 8. They all become records of his office, and may be certified as such, under the seal of the state: Id., c. 96, sec. 5. The printed statute book is evidence of the acts contained therein: Id., c. 40, sec. 1. It is, however, not conclusive, but may be corrected by the original acts on file in the secretary's office. It is competent to go behind a printed statute, and show from the enrolled law that it is erroneously published: *De Bow v. People*, 1 Denio, 9; *Rex v. Jeffries*, 1 Stra. 446; *Beecher v. James*, 2 Scam. 462. The journals of either branch of the legislature are the proper evidence of the action of that branch, upon all matters before it: 1 Greenl. Ev., sec. 490; *Root v. King*, 7 Cow. 613; *Jones v. Randall*, 1 Cowp. 17.

In our opinion, it is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether. The constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was thus passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act

must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and the executive should furnish conclusive evidence of the passage of a law. The presumption indeed is, that an act thus verified became a law pursuant to the requirements of the constitution, but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be intended that the proper entry was made on the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome, and the act must fall. This view is sustained by adjudged cases. In the case of *State v. McBride*, 4 Mo. 303 [29 Am. Dec. 636], the court looked into the journals of the legislature to ascertain whether a constitutional amendment, which had been enrolled and declared to be a part of the constitution, was in fact ratified by the requisite number of the members of the legislature. In *Green v. Graves*, 1 Dougl. 351, the court held, on demurrer to a declaration upon a note given to the bank of Niles, that the bank had no legal existence, because the act under which it was organized did not receive the assent of two thirds of the members of the legislature. See also *Purdy v. People*, 2 Hill (N. Y.), 31; S. C., 4 Id. 384.

The act in question was signed by the speakers of the two houses, and it received the assent of the executive. *Prima facie*, therefore, it became a law. But the journal of the house of representatives fails wholly to show that it was ever put upon its final passage in that house; in other words, it does not appear that it passed with the concurrence of a majority of the members elect of that body. The act did not become a law in pursuance of the provisions of the constitution, and it is therefore null and void.

The judgment is reversed.

TRUMBULL, J., not sitting.

Judgment reversed.

LEGISLATIVE JOURNALS AS EVIDENCE OF DUE PASSAGE OF STATUTES: See this question discussed in the note to *Jones v. Jones*, 51 Am. Dec. 616, where the principal case is considered at length; *Skinner v. Deming*, 54 Id. 463, and note. The principal case was cited in *Davenport v. Young*, 16 Ill. 553; *Gardner v. Collector*, 6 Wall. 510; *Turley v. Logan Co.*, 17 Ill. 153; *Prescott v. Board of Trustees*, 19 Id. 327; *Board of Supervisors v. People*, 25 Id. 183, on the general proposition that courts have the right to look to legislative journals to ascertain whether statutes have been passed as required

by the constitution; and see the latter Illinois cases considered in *People v. Starne*, 35 Id. 140, 141, where also the principal case is referred to at length on this point, and on other points therein held; also *People v. De Wolf*, 62 Id. 255. As was said in the note to *Jones v. Jones*, *supra*, the principal case has been distinguished on this question, in that it was decided under the peculiar provisions of the constitution of Illinois. See this distinction made in *Sherman v. Story*, 30 Cal. 270; *Pacific R. R. v. Governor*, 23 Mo. 366, 367; *State v. Swift*, 10 Nev. 195, 199. It must appear from the journals that the bill passed by the constitutional majority: *Barr v. Village of Auburn*, 89 Ill. 362; *People v. Starne*, 35 Id. 140, 141; and where the journals show that the bill was not passed as required by the constitution, the act never became a law: *Ryan v. Lynch*, 68 Id. 164; *Board of Supervisors v. People*, 25 Id. 181. But in the latter case a distinction was made, in that when the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In *Illinois Central R. R. v. Wren*, 43 Id. 79, it was held that where parties seek to raise the question whether the yeas and nays were duly called upon the passage of an act, it is not sufficient to refer the court to the journal; a duly authenticated copy of so much of the original journal as shows the facts relied upon for impeaching a law *prima facie* valid must be brought before the court through the record; and it was said that in the principal case the journals were made a part of the bill of exceptions.

FRINK v. DARST.

[14 ILLINOIS, 304.]

SUBSEQUENTLY ACQUIRED TITLE BY RELEASOR WILL NOT VEST IN RELEASEE by a deed by which the grantor does "grant, sell, and convey" unto the grantee all his "right and interest in and unto" certain described lands, "to have and to hold the same to the said grantee, his heirs and assigns forever," if the releasor had no interest in the lands at the time of the execution of the deed.

RELEASE OR SIMPLE QUITCLAIM DEED IS INEFFECTUAL TO VEST SUBSEQUENTLY ACQUIRED TITLE by the releasor in the releasee, when made by one having no interest at the time, containing no covenants express or implied, and professing to convey only such interest as the releasor had.

HABENDUM CAN NOT BE USED TO CONVERT RELEASE OR QUITCLAIM DEED INTO CONVEYANCE OF FEE SIMPLE ABSOLUTE, when the grantor has no such interest to convey, and in fact no interest at all.

DEED MUST PURPORT TO CONVEY ESTATE IN FEE SIMPLE ABSOLUTE, or a perfect or indefeasible title, and be not a quitclaim deed, or a deed merely professing to convey the grantor's right and interest, in order that it may be affected by section 7, Illinois revised statutes of 1833, p. 131, and a subsequently acquired title may inure thereunder to the benefit of the grantee.

DECISIONS AFFECTING RIGHT TO PROPERTY SHOULD BE UNIFORM AND STABLE; but in cases where the settled rules and reasons of the law have been departed from, it becomes the duty of the court, before the error has

been sanctioned by repeated decisions, to embrace the first opportunity to pronounce the law as it is.

SOLITARY DECISION OF RECENT DATE HAS NEVER BEEN HELD TO CHANGE LAW IN ANY CASE; and especially should it not have that effect where to adhere to it would be fraught with far greater injustice than could possibly arise from overruling it in the particular case.

VERDICT. Plea, not guilty. The defendant had judgment, and the plaintiffs sued out this writ of error. The opinion states the facts.

John Frink, for the plaintiffs in error.

N. H. Purple, for the defendant in error.

By Court, TRUMBULL, J. The only question involved in this case is the effect to be given to, and whether a subsequently acquired title passes by, the following deed, to wit: "Know all men by these presents, that I, John L. Bogardus, of Peoria, in the county of Peoria and state of Illinois, in consideration of one thousand and fifty dollars to me in hand paid by Isaac Underhill, of said Peoria, the receipt whereof I do hereby acknowledge, do hereby grant, sell, and convey unto the said Underhill, all my right and interest in and unto the south-east fractional quarter of section 9 in township 8 north, range 8 east of the fourth principal meridian in said Illinois, and also in and unto the ferry established across the Illinois river in said Peoria, together with all the boats and other implements thereunto belonging; to have and to hold the same to the said Underhill, his heirs and assigns forever, with all the privileges and appurtenances thereunto belonging. In witness whereof, I have hereunto set my hand and seal this fifth day of August, A. D. 1834. (Signed) JOHN L. BOGARDUS. [L. S.]"

To determine the effect to be given to this deed, we must ascertain its character. Manifestly it is nothing more than an ordinary quitclaim deed, conveying whatever interest the releasor had in the premises at the time. This is the plain common-sense view of the instrument. It purports to convey nothing more than the interest which Bogardus then had in the land. If he had a perfect title, the instrument was sufficient to transfer it; if he had no title and no interest in the land, clearly none passed by the deed; for it only professes to transfer his interest, whatever it was. Such instruments are common in this state, and if we are to gather the intention of parties from the language used, and from what we believe to be the common understanding of both those who execute and those

who receive them, they are never designed to transfer anything more than the interest of the grantor at that time, be it more or less, or nothing at all.

Such being the natural import of the language used, we will now inquire whether there is anything in the law to change its meaning. The deed contains no express covenants of any character, nor does it contain words from which any can be implied.

The words "grant, bargain, sell," are not in it; and therefore the statute which adjudges those words to be an express covenant of certain facts is not applicable: *Gee v. Pharr*, 5 Ala. 586 [39 Am. Dec. 339]; *Whitehill v. Gotwalt*, 3 Pen. & W. 323.

It was insisted on the argument that the quitclaim by Bogardus to Underhill, although the former had no title at the time, created a use or trust in favor of the latter, which the statute of uses made effectual in him, whenever Bogardus acquired the title. To sustain this position, the second section of the act concerning conveyances, R. S. 1833, p. 129, as also several authorities, were referred to. The statute and the cases to which reference was made have no application to this case. The statute makes effectual a deed or release as against the grantor or releasor; and all others claiming an interest in the premises granted or released to the use of the grantor or releasor at the time the deed or release was made. It by no means declares that a deed or release of his interest, by a person having no title, should operate to vest in the grantee or releasee a perfect title, in case the grantor or releasor should ever afterwards obtain one.

The case of *Jackson v. Fish*, 10 Johns. 456, was this: A soldier in the service of the United States, entitled to a donation of land for his services, transferred his claim to the same before receiving a patent therefor, by a deed of quitclaim or release; and the court held that when the patent issued, it was for the benefit of the releasee. This case was doubtless rightly decided, but it has no analogy to the one at bar. The soldier, at the time he executed the quitclaim deed, had a claim to a tract of land from the government, and most undoubtedly, when that claim was afterwards perfected by the issuing of a patent, it was for the benefit of him to whom the claim had been transferred; and there is no pretense in the record before us that Bogardus, at the time he executed the quitclaim deed to Underhill, had any claim to the land in question, or to any land which was the foundation of the patent that afterwards issued.

The cases referred to in the Massachusetts reports are generally cases where the releasor had the legal title at the time the

release was executed; but it was made ineffectual by reason of the technical objection that the releasee was not in possession at the time. In such cases, the courts, in order to give effect to the clear intention of the parties, have held that such releases, containing covenants of warranty, would amount to a covenant to stand seised to the use of the releasee: *Pray v. Pierce*, 7 Mass. 381 [5 Am. Dec. 59]; *Russell v. Coffin*, 8 Pick. 153.

If the releasor has no interest at the time, then nothing passes by the deed, and it can only operate as an estoppel when the deed contains covenants express or implied which give it that effect.

With the single exception of the decision in our own reports, hereafter to be noticed, no case has been referred to, and none, I apprehend, can be found, in which a release or simple quitclaim deed, made by one having no interest at the time, containing no covenants either express or implied, and professing to convey only such interest as the releasor had, was held effectual to vest a subsequently acquired title by the releasor in the releasee, either upon the principle of estoppel, that the subsequent title is to be held as acquired for the use of the releasee, or upon any other principle. On the contrary, the books are full of cases in which it is held that by a release or quitclaim deed of this character no right passes but the right which the releasor has at the time of the release made: Co. Lit., sec. 446, p. 265, a, b; *Bogy v. Shoab*, 13 Mo. 366; *Dart v. Dart*, 7 Conn. 250; *Jackson d. McCrackin v. Wright*, 14 Johns. 193; *Jackson v. Winslow*, 9 Cow. 18; *Jackson v. Peek*, 4 Wend. 305; 4 Cru. Dig., tit. 32, Deed, c. 6, sec. 38; *Jackson v. Hubble*, 1 Cow. 613; *Right v. Bucknell*, 2 Barn. & Adol. 278; *Allen v. Holton*, 20 Pick. 458; *Kinsman v. Loomis*, 11 Ohio, 475.

The release or quitclaim given by Bogardus not containing a covenant of any character, the authorities already cited settle the question that it can not operate by way of estoppel to prevent him or those claiming under him from asserting a subsequently acquired title.

Reference has been made to the *habendum* clause in the deed under consideration, for the purpose of showing that an estate in fee would have passed by the deed, if Bogardus had at the time possessed such an estate. This is true, but the *habendum* can not be made to effect the conveyance of a thing not mentioned in the premises of the deed; nor can it transform a deed, purporting in the premises to convey only the interest of the grantor, into a conveyance of the fee simple absolute.

It is said in Cruise's Digest, vol. 4, tit. 32, Deed, c. 21, sec. 73: "Nothing can be limited in the *habendum* of a deed which has not been given in the premises; because the premises being the part of the deed in which the thing is granted, it follows that the *habendum*, which is only used for the purpose of limiting the certainty of the estate, can not increase the gift; for in that case the grantee would in fact take a thing which was never given to him."

If this is the character and office of the *habendum*, as all the elementary writers and reported cases clearly show, it is most manifest that it can not be used to convert a release or quitclaim of a party's interest in land, into a conveyance of the fee simple absolute, when the party has no such interest to convey, and in fact no interest at all.

It has been insisted that the character of the deed under consideration is changed by the seventh section of an act concerning conveyances of real property: R. S. 1833, p. 131; and that by virtue of that section of the statute the subsequent title acquired by Bogardus inured to the benefit of his grantee in the quitclaim deed.

That section of the statute is in these words: "If any person shall sell and convey to another, by deed or conveyance purporting to convey an estate in fee simple absolute in any tract of land or real estate lying and being in this state, not then being possessed of the legal title or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust, and for the use of the grantee or vendee; and the conveyance aforesaid shall be held and taken and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance."

It would seem to be a sufficient answer to the argument based upon this statute to say that the deed of Bogardus does not purport to convey an estate in fee simple absolute. If it does purport to convey such an estate, it may well be asked how could a deed be framed that would purport to convey a less estate?

The language of the deed is: "I do hereby grant, sell, and convey to the said Underhill all my right and interest in and unto," and then follows the description of the land. The deed only professes to convey such interest as the vendor had in the premises, be that interest more or less, or nothing at all; and

to construe it as purporting to convey anything else is a perversion of its terms.

An estate in fee simple absolute means a perfect title. It "is the entire and absolute interest and property in the land; from which it follows that no one can have a greater estate:" 1 Cru., tit. Estate in Fee Simple, sec. 44.

It is only to deeds purporting to convey an estate of this character that the statute has any application.

The supreme court of Missouri, in the case of *Bogy v. Shoab*, already referred to, have placed a construction upon a statute of that state which is precisely similar to ours; and the reasoning of the judge who delivered the opinion is so apt and conclusive that we are disposed to adopt it as containing a proper exposition of our act also. He says: "It then depends upon the character of the deed whether it is to be affected by our statute. It must be a conveyance purporting to pass the fee simple absolute. This language is not certainly used in a technical sense. The term 'fee simple' is known at the common law as one which defines the quantity of the estate. It is used in contradistinction from a fee tail, a life estate, or a term of years. It is evidently not employed in this sense in this provision of the act. It was surely not intended that a quitclaim deed, although the deed uses language to pass the fee, and not any smaller estate, would, therefore, pass a new title not belonging to the grantor when he makes the deed. It was hardly intended to apply to a deed conveying all right, title, and interest of the grantor. Such a deed will undoubtedly pass the land itself, if the grantor has an estate therein at the time of the conveyance, but it passes no estate which was not then possessed.

"Nor would it be in accordance with the manifest intent of such conveyance that after-acquired titles should pass. So where a party had a vested interest and also a contingent remainder in lands, and conveyed 'all his right, title, and interest,' the deed was held only to convey his vested interest, although, in this case the deed contained a general warranty. The warranty was held to be only co-extensive with the grant, and therefore not estopping the grantor from claiming the contingent interest when it vested: *Pelletreau v. Jackson*, 11 Wend. 110.

"A deed, purporting to convey a fee simple absolute is not then, in my opinion, a deed which merely conveys something more than a fee tail, or life estate, or term of years. The statute intended something more than this. The term 'absolute'

gives a clew to the meaning of the whole phrase, which, I think, is drawn from common usage, and not from the technical phraseology of law-writers. Every man unlearned in the law understands what a deed conveying a fee simple absolute is. They understand it, as I humbly apprehend, to be a deed which purports or professes to convey an indefeasible title: not a quitclaim deed, not a deed merely transferring the grantor's interest, be it more or less; but a deed conveying the land itself, and professing to convey it in such a manner that the grantee is not to be disturbed in his possession by any one. It may be, then, that our statute was intended to settle a question which had been much discussed, and about which there was certainly great conflict of opinion: whether a general warranty would operate to transfer a subsequently acquired legal title. It undoubtedly settles this question in the affirmative, and, I think, it goes further: it puts the whole question upon principles of sound sense and strict justice. It does not limit its operation to deeds containing covenants of general warranty, but it extends to every deed which purports to convey a fee simple absolute, whether it contains a general warranty or not. It is easy to imagine numerous cases in which there are conveyances obviously intended and purporting to convey absolute titles, but which omit any covenants of warranty. It does not reach and ought not to apply to a deed, when the grantor expressly guards against such inference by inserting a special warranty against his own acts, and those claiming under him."

We have considered this case more at length than we should have done but for the decision of this court in the case of *Doe d. Frisby v. Ballance*, 2 Gilm. 141, in which a different construction was put upon the statute and the deed under consideration from the one which we now feel constrained to adopt. After the fullest consideration, we are clearly satisfied that the decision then made was erroneous. The authorities referred to in the opinion do not sustain it, nor have we been able to find any which do. The decision, it is understood, has never given satisfaction to the bar, or been considered as finally settling the effect to be given to a quitclaim deed under our statute.

It is highly important that the decisions of the court affecting the right to property should be uniform and stable; but cases will sometimes occur in the decisions of the most enlightened judges where the settled rules and reasons of the law have been departed from, and in such cases it becomes the duty of the court, before the error has been sanctioned by repeated de-

cisions, to embrace the first opportunity to pronounce the law as it is. A solitary decision of recent date has never been held to change the law in any case; and especially should it not have that effect where to adhere to it would be fraught with far greater public injustice than could possibly arise from overruling it in the particular case. Deeds of this character are common in Illinois, and the titles of hundreds, contrary, as we are satisfied, to the understanding of parties at the time they were executed, and to the opinions of the legal profession, will be unsettled, if the decision in *Doe d. Frisby v. Ballance*, *supra*, is to stand as the law.

Although it is a delicate matter for a court to overrule one of its former decisions, settling the liability of a party or a right of property, yet the law-books furnish many instances in which it has been done when the first decision was manifestly erroneous and calculated to work injustice.

The general rule is thus stated in the case of *Bowers v. Green*, 1 Scam. 43: "The maxim *stare decisis* is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude courts from investigating former decisions, when the question has not undergone repeated examination and become well settled." In the case of *Shields v. Perkins*, 2 Bibb, 230, the court, in considering the question before them, say: "This doctrine is not founded upon a mere rule of practice, changeable at the pleasure of the courts, but upon the solid basis of justice, and vitally and essentially affects the rights and interests of defendants." The court then proceed to overrule a former decision of the same court, upon the same question, made in the case of *Caldwell v. Price*, Hard. 69, and conclude their opinion as follows: "For our own convenience, as well as for the sake of uniformity of decision, we are always disposed to follow the precedents which our predecessors have given us; but where in those precedents we find, as will be always found in the adjudications of the most vigilant and enlightened judges, occasional aberrations from the settled rules and reasons of the law, we feel it our duty not to depart from them. A solitary decision has never been held to change the law in any case, and much less ought it to have that effect in a case like the present, where the rule is so well calculated for the attainment of justice, and so firmly established by a uniform train of uncontroverted authorities."

The supreme court of Ohio, in the case of *Chesnut v. Shane*,

16 Ohio, 599 [47 Am. Dec. 387], held the acknowledgment of a deed by a married woman sufficient, and the deed valid to pass her estate, overruling a former decision of the same court, in the case of *Connell v. Connell*, 6 Id. 358. The same case also holds valid a curative act of the legislature of Ohio, giving effect to deeds defectively acknowledged, thereby overruling two former decisions of the same court which had declared the act void.

The supreme court of Tennessee, in 1825, put a construction upon their statute of limitations, in reference to a peaceable possession of land for seven years, which must have had the effect to divest many titles acquired upon the faith of their former decisions, made in 1815, which were overruled; and what is more, the supreme court of the United States followed that of Tennessee in their change of construction of the act: *Hickman v. Gaither*, 2 Yerg. 200; *Green v. Neal*, 6 Pet. 291.

The courts of New York have at different times adopted different rules, materially affecting the rights and liabilities of parties, as to the effect which is to be given as an indorsement of his name by a person other than the payee of a promissory note on the back of the same: *Hall v. Newcomb*, 3 Hill (N. Y.), 233; S. C., 7 Id. 416 [42 Am. Dec. 82].

Many other cases might be cited, showing that courts do sometimes overrule their former decisions, even in cases affecting the rights and liabilities of parties; but we forbear to swell this opinion by a reference to them.

It is the unanimous opinion of the court that the quitclaim deed from Bogardus to Underhill is insufficient to vest in the latter a title acquired by Bogardus subsequent to the execution of the deed.

The judgment of the circuit court is therefore reversed, and the cause remanded for further proceedings.

Judgment reversed.

HABENDUM'S OFFICE IS NOT TO GRANT ESTATE, but to limit its certainty: *Brown v. Manter*, 53 Am. Dec. 223.

DOCTRINE OF STARE DECISIS: See *Gee's Adm'r v. Williamson*, 27 Am. Dec. 628, and note considering the doctrine; see also *Smith v. Henry*, 44 Id. 540; *Hildreth v. Tomlinson*, 50 Id. 510; *Borden v. State*, 54 Id. 217. The principal case was cited in *Newberry v. Blatchford*, 106 Ill. 621, to the point that the doctrine of *stare decisis* can not be supported by the ruling of the court in only one case, unless the law there laid down has become an element of subsequent contracts, or a rule of property under which intervening rights have come into existence.

SUBSEQUENTLY ACQUIRED TITLE BY GRANTOR, WHEN VESTS IN GRANTEE, IN GENERAL.—Where one sells and conveys lands to which he has no title,

but afterwards acquires title, this title inures to the benefit of his grantee. See this proposition, as thus generally stated, laid down in the following cases: *McWilliams v. Nisly*, 7 Am. Dec. 654; *McPherson v. Cunliff*, 14 Id. 642; *Morrison v. Caldwell*, 17 Id. 84; *Brown v. McCormick*, 31 Id. 450. An after-acquired title inures to the grantee's benefit under a deed with covenant of warranty; or a grantor under such a deed is estopped from setting up an after-acquired title: *Williams v. Gray*, 14 Id. 234; *Kimball v. Blaisdell*, 22 Id. 476; *Comstock v. Smith*, 23 Id. 670; *Baxter v. Bradbury*, 37 Id. 49; *Trull v. Eastman*, Id. 126, and note; *Rigg v. Cook*, 46 Id. 462; *Bank of Utica v. Mersereau*, 49 Id. 189; but see *Berthelemy v. Johnson*, 38 Id. 179. But a grantor is not estopped by a special warranty: *Comstock v. Smith*, 23 Id. 670, and note; but see *Williams v. Gray*, 14 Id. 234. Nor does the doctrine of estoppel apply to a grant from the state so as to pass an after-acquired title: *Casey's Lessee v. Inloes*, 39 Id. 658. Covenants of lawful seisin in fee and good right to convey do not estop the grantor from setting up an after-acquired title against the grantee: *Allen v. Sayward*, 17 Id. 221; and an after-acquired title will not pass under a quitclaim deed: *Tillotson v. Kennedy*, 39 Id. 330. As to the effect of a deed of bargain, and sale upon an after-acquired title, see *Taylor v. Shufford*, 15 Id. 512; *Dowell v. Buchanan's Ex'rs*, 23 Id. 280.

WHAT ARE CONVEYANCES IN FEE SIMPLE ABSOLUTE UNDER STATUTES PASSING AFTER-ACQUIRED TITLES TO GRANTEES.—The statutes of many of the states and territories provide for the passing of after-acquired titles to grantees when grantors purport to convey real estate in fee simple absolute; and the object of this note is to ascertain what is a conveyance in "fee simple absolute" within the meaning of this legislation.

VARIOUS STATUTORY PROVISIONS CONSIDERED.—The revised statutes of Illinois (1880, by Hurd), c. 30, sec. 7, provide that "if any person shall sell and convey to another, by deed or conveyance purporting to convey an estate in fee simple absolute in any tract of land or real estate lying and being in this state, not then being possessed of the legal title or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee; and the conveyance aforesaid shall be held and taken and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance." This provision is adopted in Colorado: R. S. (1883), c. 18, sec. 4; and was the law of Missouri under the act of 1825, sec. 6, p. 217, regulating conveyances. The statutes of other states and territories contain the following provision, which differs somewhat from the above: "If any person shall convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid, as if such legal estate had been in the grantor at the time of the conveyance:" Arizona, Comp. Laws (1877), c. 42, sec. 33; California (former statute), act of 1850, sec. 33; 1 Hittell's Gen. Laws (1865), sec. 675; Idaho, R. L. (1874-5), p. 602, sec. 33; Montana, R. S. (1879), p. 443, sec. 209; Nevada, 1 Comp. Laws (1873), sec. 261. The present statutes of Kansas and Missouri are alike. They are substantially the same as the section last above given, but differ from it somewhat in wording: Kansas, Comp. Laws (1881), c. 22, sec. 5; Missouri, R. S. (1879), c. 69, sec. 3940. A former statute of Kansas was like that of Iowa,

quoted *post*. In Arkansas the section reads: "If any person shall convey any real estate by deed purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate afterward acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantee at the time of the conveyance:" Dig. of L. (1874), c. 29, sec. 832. The California and Dakota codes provide that "where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors:" California Civil Code, sec. 1106; Dakota Civil Code, sec. 633, subd. 4. In Iowa the provision is: "Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee:" Code, sec. 1931; and a like provision is found in Nebraska, with the following clause: "Provided, however, that such after-acquired interest shall not inure to the benefit of the original grantor [grantee], or his heirs or assigns, if the deed conveying said real estate was either a quitclaim or special warranty, and the original grantor in any case shall not be stopped from acquiring said premises at judicial or tax sale, upon execution against the grantee or his assigns, or for taxes becoming due after date of his conveyance:" Comp. Stat. (1881, by Brown), c. 73, sec. 51. The Georgia code (1882), section 2699, provides: "The maker of a deed can not subsequently claim adversely to his deed under a title acquired since the making thereof. He is estopped from denying his right to sell and convey;" and the Mississippi revised code, section 1195, that "a conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequently acquired title to the lands conveyed." A provision is found in other states, which may be noticed in this connection, to the effect that "a deed of quitclaim and release of the form in common use shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale:" Michigan, Gen. Stat. (1882, by Howell), sec. 5652; Minnesota, Stat. (1878), c. 40, sec. 4; Oregon, Gen. Laws (1864), p. 647, sec. 3; Wyoming, Comp. Laws (1876), c. 3, sec. 3; and see, as giving a construction to such a statute, *Hoffman v. Harrington*, 28 Mich. 90, 103.

GENERAL SCOPE OF STATUTES.—It is obvious from an examination of the foregoing statutory provisions that some differences will occur among the decisions in regard to the vesting in grantees of after-acquired estates by grantors; but aside from this, there is some conflict in the cases of different states having substantially the same statutes, and even in the cases of the same state, as to what is a conveyance in fee-simple absolute thereunder. The case of *Bogy v. Shoab*, 13 Mo. 365, which is quoted from at length in the principal case, fully considered the meaning of this term; but the subsequent decision of *Valle v. Clemens*, 18 Id. 486, makes this observation: "That case certainly gives to the language of the section a very extended operation, when it allows it to embrace any case of the conveyance of title without warranty, where the grantor at the time had no title, but afterwards acquires title." In *Evans v. Labadie*, 10 Id. 425, the same view of the statute seems to have been taken as in *Bogy v. Shoab*, *supra*, for the court there says: "Our statute is silent about any warranty; where a deed purports to convey a fee simple absolute, whether with or without warranty, the subsequently acquired legal estate

will pass;" so also it is held in *Crittenden v. Johnson*, 14 Ark. 447, that before the statute, which affects subsequent conveyances only, and has no retrospective operation, an after-acquired title by the grantor related to and perfected the title of his grantee only where he had conveyed by deed with covenant of warranty, implying that the rule is otherwise under the statute. Holmes, J., thus discusses the question in *Gibson v. Chouteau*, 39 Mo. 536: "This deed does not purport to convey a fee simple absolute. To have this effect, under the statute, the deed must undertake to convey an indefeasible title. It must not be a quitclaim deed merely, transferring the grantor's interest, whatever it may be, but a deed which expressly undertakes to convey the land itself, and to convey it in such a manner that the grantee is not to be disturbed in his possession by any one. It must contain such positive and certain averments of an absolute title in fee simple as would amount to an express warranty, if contained in a covenant of warranty, that the grantor was seised and possessed of such title and estate, which he undertook to convey, assure, and confirm to the grantee against all the world, and would therefore create an estoppel by virtue of which the subsequently acquired title might inure to the grantee;" and the principal case was cited (p. 568), as giving the same construction to the similar statute of Illinois. In *Norfleet v. Russell*, 64 Id. 176, it was held that a subsequently acquired title will pass, where it distinctly appears on the face of the prior deed that the intent of the grantor was to convey a fee-simple estate, and the deed contains covenants of further assurance of title. In Arkansas, if one conveys real estate by deed purporting to convey the fee simple or any less estate, and shall not at the time have the legal estate in the lands, but shall afterwards acquire the same, the title afterwards acquired vests in the grantee as effectually as though originally conveyed: *Cocke v. Brogan*, 5 Ark. 693; and under a former statute of Kansas, which was the same as the present Iowa statute, it is held that the after-acquired title of a grantor passes to his grantee to the extent of the interest purported to have been conveyed: *Gray v. Ulrich*, 8 Kan. 112.

QUITCLAIM DEEDS, AS PASSING AFTER-ACQUIRED TITLES UNDER STATUTES. The rule is well settled that a title subsequently acquired by a grantor will not vest in his grantee under a quitclaim deed; such deeds are not conveyances in fee simple absolute within the meaning of the statutes: *Bogy v. Shoah*, 13 Mo. 365; *Simpson v. Greeley*, 8 Kan. 586; *Collamer v. Kelley*, 12 Iowa, 319, 326; *San Francisco v. Lawton*, 18 Cal. 465; *Cadis v. Majors*, 33 Id. 288; *McDonald v. Edmonds*, 44 Id. 328; *Holbrook v. Debo*, 99 Ill. 372. The principal case was cited in *Hawk v. McCullough*, 21 Id. 223, as establishing this doctrine; and in *Phelps v. Kellogg*, 15 Id. 131, 135, it was held that the legal aspect of the principal case was not changed when it appeared that prior to the date of the deed the grantor had established a right of pre-emption to the land; nor in ejectment would it make any difference that subsequent to the execution of the deed he entered the land under this pre-emption right with funds furnished by the grantee, and obtained the legal title from the United States. A deed containing the words "bargain, sell, release, quitclaim, and convey," is a deed of release and quitclaim merely, under which an after-acquired title does not pass: *Gibson v. Chouteau*, 39 Mo. 536. So with a deed which "grants, bargains, and sells all the right, title, and interest" of the grantor: *Butcher v. Rogers*, 60 Id. 138. So where the grantor bargains, sells, and quitclaims "all his right, title, interest, estate, claim, and demand" in certain premises: *Gee v. Moore*, 14 Cal. 472. And the same is held where the words of a conveyance are "grants, bargains, sells, aliens, releases, quitclaims, and conveys:" *Bruce v. Luke*, 9 Kan. 201. In *Valle v.*

Clemens, 18 Mo. 486, a husband and wife executed a deed by which they bargained, sold, and quitclaimed to the grantee and his heirs "all their and each of their right, title, interest, estate, claim, and demand, both at law and in equity, as well in possession as in expectancy, of, in, and to" a certain tract of land. The wife at the time had an interest in the land upon which the deed might have operated if it had been properly executed. It was held that a title subsequently acquired by the husband did not inure to the grantee under the act of 1825; the deed was a mere quitclaim, without warranty, and the words "in expectancy" did not comprehend a title to be thereafter purchased. An after-acquired title does not vest in the grantee where a deed "granted, bargained, sold, and hereby conveys" certain premises, there being a clause in the deed to the effect that "it is fully understood that as to title this is only a quitclaim deed:" *Morrison v. Wilson*, 30 Cal. 344. The case of *Doe d. Frisby v. Ballance*, 2 Giln. 141, which was overruled by the principal case, on the question of the effect of a quitclaim deed on an after-acquired title, having been followed by the United States circuit court for the district of Illinois, the supreme court of the United States, in *Morgan v. Curtenius*, 20 How. 1, 3, affirmed the ruling, holding that the different construction of the statute subsequently given by the principal case would not authorize the reversal of the judgment, as having been erroneously made. Where a quitclaim deed contains a covenant of non-claim, or special covenant of warranty, an after-acquired title will not inure thereunder: *Gee v. Moore*, 14 Cal. 472; *Kimball Semple*, 25 Id. 440; *Morrison v. Wilson*, 30 Id. 344, 348; *Quivey v. Baker*, 37 Id. 465; *Holbrook v. Debo*, 99 Ill. 372, 382; and this doctrine was extended to a case where the covenant read, "that the title to the foregoing premises he [the grantor] will forever warrant and defend against the claim or claims of all and every person whatsoever:" *Barrett v. Birge*, 50 Cal. 655; but if a quitclaim deed contains a covenant for further assurances, a subsequent title inures under the covenant: *Bennett v. Waller*, 23 Ill. 183, 184; in which, also, the principal case was distinguished, in that the deed in the one at bar remised, released, and forever quitclaimed the land itself, and was not a mere release of whatever interest the grantor had in the premises. It is further held in Illinois, although no statute was referred to, that if a party, having the equitable title to land, and being entitled to the naked legal title, which was in the state, conveys the same by quitclaim deed, and subsequently acquires the legal title, it will inure to his grantee: *Welch v. Dutton*, 79 Id. 465. Under the statute of Mississippi, it is evident that a quitclaim deed has the same effect to estop the grantor and his heirs from asserting a subsequent adverse title to the lands conveyed as has a deed with covenants of general warranty: *Chapman v. Sims*, 53 Miss. 154, 169.

WARRANTY DEEDS AS PASSING AFTER-ACQUIRED TITLES.—In several cases arising in states which have adopted the foregoing statutes it has been held that where a grantor purports to convey, with warranty, an absolute title in fee simple, or where he conveys with a covenant of general warranty, an after-acquired title will inure to the benefit of his grantee: *Van Orman v. McGregor*, 23 Iowa, 300; *Rogers v. Hussey*, 36 Id. 664, 667; *Jones v. King*, 25 Ill. 383; *Gochenour v. Mowry*, 33 Id. 331; *Wadhams v. Gay*, 73 Id. 415; although some of these cases seem to be based rather upon the common-law doctrines than upon the statutes. But an after-acquired interest by a wife in real estate of her husband, with whom she joined in a conveyance, with covenant of warranty, thereby relinquishing her right of dower, will not inure to the prior grantee: *O'Neil v. Vanderburg*, 25 Iowa, 104; *Childs v. McChesney*, 20 Id. 431, 437; *Schaffner v. Grutzmacher*, 6 Id. 137. In regard to

the effect of covenants of special warranty contained in quitclaim deeds, see *supra*.

BARGAIN AND SALE DEEDS AS PASSING AFTER-ACQUIRED TITLES.—It is likewise held that under deeds of bargain and sale after-acquired titles pass; although here, also, the cases do not all seem to be based upon the statutes in question: *Clark v. Baker*, 14 Cal. 612, 630; *Green v. Clark*, 31 Id. 591; *Dalton v. Hamilton*, 50 Id. 422; *De Wolf v. Haydn*, 24 Ill. 525; *King v. Gilson's Adm'r*, 32 Id. 348; and see *Crane v. Salmon*, 41 Cal. 63. In the first of these cases Field, C. J., says: "And though, in this country, conveyances by feoffment, fine, or common recovery are not in use, no greater effect is given to a grant or a conveyance by bargain and sale, or lease and release, unaccompanied with covenants of warranty, than at common law under the statute of uses. They pass only the estates which are vested in interest at the time, and do not bind or transfer by way of estoppel future or contingent estates. Such is the doctrine of the most maturely considered cases, though we admit there are conflicting authorities on the point;" but he continues: "The thirty-third section of the act concerning conveyances changes the rule of the common law as to the effect of deeds under the statute of uses upon subsequently acquired interests of the grantor, and gives to them an operation equivalent to the most expressive covenant of warranty."

MISCELLANEOUS CASES AND QUESTIONS UNDER STATUTES.—The California act of 1850 is held to apply equally to mortgages absolute in form as to conveyances; the word "conveyance" by a section of that act including "mortgage" within its meaning: *Clark v. Baker*, 14 Cal. 612. Mr. Chief Justice Field said: "The terms 'fee simple absolute' are used to denote an estate of inheritance conveyed or mortgaged. The word 'absolute' adds nothing to the force of the preceding terms 'fee simple,' which, of themselves, express the highest interest in land. * * * No stress can be placed upon the language 'that the estate subsequently acquired shall immediately pass to the grantee,' as limiting the provisions of the section to conveyances which are absolute in form. A mortgage is in form a conveyance, and though upon the application of equitable doctrines, and upon the construction of section 260 of the practice act passed in 1851, the instrument is regarded in this state as creating a mere lien or incumbrance, it yet operates upon the estate for the purposes of the security. The statute only intends by the language in question to provide that the subsequently acquired estate shall be completely covered by the instrument, whether conveyance or mortgage, as if originally possessed by the grantor or mortgagor." This case has been approved in *Lent v. Morrill*, 25 Id. 500; and followed in *Kirkaldie v. Larrabee*, 31 Id. 457. See also, in this connection, section 2930, Cal. Civil Code. The present Missouri act relates only to estates conveyed in fee simple absolute, and does not apply to conveyances of leasehold interests. Thus where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and before the maturity of the note the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, the lease will not inure to the benefit of the purchaser under the deed of trust: *Geyer v. Girard*, 22 Mo. 159. Where a party covenants in a deed that if at any time thereafter he shall acquire title, that such title shall inure to the benefit of the grantee in the deed, it is binding on all persons deriving title through the grantor with notice of the deed: *Phelps v. Kellogg*, 15 Ill. 131. For a case where a subsequent title did not inure when the grantee and his assignees had been guilty of gross negligence in not examin-

ing the records to see what prior conveyances were made by the grantor, see *Picot v. Page*, 26 Mo. 398. It is held that the words "legal title," in the Missouri statute of 1825, mean any title coming to a grantor which would clothe him with the power of turning his grantee out of possession; and therefore where a grantor purported to convey a tract of land to which he claimed a pre-emption, a title acquired by his entry of the land before a patent was issued to him will inure to the benefit of his grantee, the laws of Missouri authorizing the action of ejectment to be maintained upon such entry: *Evans v. Labaddie*, 10 Id. 425; see also *Phelps v. Kellogg*, 15 Ill. 131; *Gray v. Ulrich*, 8 Kan. 112, as to the rights of a grantee of land for which a patent is afterwards issued to the grantor. If a state conveys lands to which it afterwards acquires title under a resolution of congress, the title inures to the benefit of its grantees: *Bellows v. Todd*, 39 Iowa, 209, 217. Where between the date of the conveyance and the acquisition of the perfect title a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment: *Watkins v. Wassell*, 15 Ark. 73; and where A. executed to B. a deed of conveyance of land to which he had then no title, and A. afterwards purchased and received a deed of the premises from C., the owner, and executed back to him a mortgage thereon to secure part of the purchase money, by the conveyance to A. the title does not inure to B. so as to affect the rights of C. under his mortgage: *Morgan v. Graham*, 35 Iowa, 213. In order that a conveyance may so operate as to pass an after-acquired title under the statute, it must, it seems, be so executed that it would have passed the grantor's estate at the time of execution, if he had then had the title: *Heaton v. Fryberger*, 38 Id. 185.

BELLEVILLE AND ILLINOISTOWN RAILROAD COMPANY v. GREGORY.

[15 ILLINOIS, 20.]

INTENTION OF LEGISLATURE AS EXPRESSED IN ANY PORTION OF LAW IS PROPERLY SOUGHT FOR by looking into the whole law.

RIGHT IS GIVEN TO EXTEND ROAD TO AND UNITE WITH ANY OTHER ROAD WITHIN PRESCRIBED LIMITS, by a general power conferred upon a railroad company by its charter, "to extend to and unite its railroad with any other railroad now constructed, or which may hereafter be constructed in this state;" and this power is not limited by other provisions declaring that certain proceedings for the condemnation of lands shall be taken in a particular county.

ONE PORTION OF LAW, TO QUALIFY, RESTRAIN, OR SUSPEND ANOTHER PORTION, must appear to have been framed with that intention.

EXPRESS PROVISION OF LAW CAN NOT BE REPEALED, OR ITS CONSTRUCTION CONTROLLED by the presumed or even well-known views of the members of the legislature. The law alone can speak the legislative will.

AOT INCORPORATING RAILROAD COMPANY IS PRIVATE LAW within the meaning of the Illinois constitution providing that no private law shall be passed which embraces more than one subject, and that shall be expressed on its title.

LEGISLATURE BY SIMPLY DECLARING PRIVATE ACT TO BE PUBLIC LAW CAN NOT EVADE EFFECT OF CONSTITUTIONAL PROVISION declaring that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title."

LAW EMBRACES BUT ONE SUBJECT when it authorizes the construction of a railroad and provides that it shall have power to extend to and unite with other roads.

SUBJECT OF BILL IS EXPRESSED IN ITS TITLE when the subject is to incorporate a railroad company, and the title is "An act to incorporate the Belleville and Illinoistown railroad company;" although the name of the company does not give a full description of the road authorized to be constructed.

TRESPASS brought by Gregory and wife, the plaintiffs below, against the railroad company, for entering upon the plaintiffs' lands, making embankments, etc. The company set up the legislative grant, the appointment of commissioners to condemn the right of way over the lands, the tender of the damages assessed, the refusal to accept, etc. A demurrer was filed to this plea, and sustained. The execution of a writ of inquiry was waived, and the plaintiffs below took judgment for one cent damages and costs.

G. Koerner, for the plaintiff in error.

S. Breese, for the defendants in error.

By Court, CATON, J. The first section of the charter creates the "Belleville and Illinoistown Railroad Company," a body politic and corporate. The second section authorizes the company to construct a railroad from Belleville to Illinoistown. The third section contains a grant of powers necessary for the execution of the work. The fourth section provides that the company may obtain the right of way, in case of disagreement with the owners, in the mode prescribed by the act relating to the rights of way, approved March 3, 1845. This section, however, subsequently provides that the governor shall appoint three commissioners to assess the damages to the owners of lands, etc., taken for the road, and it requires the commissioners to deliver their award to the company, "to be recorded by said corporation in the circuit clerk's office of St. Clair county," when the title to the land thus condemned shall be vested in the corporation, provided that notice of the intention of the company to apply to the governor for the appointment of the commissioners shall be first published for thirty days in some newspaper printed in St. Clair county. This section also provides that the taking of an appeal shall not affect the possession of the company, and that

no appeal by the owner of the land shall be allowed or writ of error prosecuted, unless the owner shall stipulate that the company may enter upon and occupy the land "upon said company giving bond and security, to be approved by the clerk of the circuit court of the county of St. Clair, that they will pay to the party appealing or prosecuting such writ of error all costs and damages that may be awarded," etc. The fifth section fixes the capital stock of the company at one hundred thousand dollars, with authority to the stockholders to increase it to the amount expended on said road. The sixth and seventh sections provide for a board of directors, their election, meetings, etc. The eighth section requires the office of the company to be located in the city of Belleville. The ninth, tenth, and eleventh sections relate to the mode of operating the road. The twelfth section provides for crossing other roads, watercourses, etc. The thirteenth section relates to dividends. The fourteenth authorizes the company to purchase land and to work the coal beds therein, and for that purpose they may buy out other companies or lease their tracks, rights, and privileges, "and may make, have, use, and maintain any and all branch roads by said company deemed necessary in transacting their business, condemning all lands and ways therefor as hereinabove provided." This section also authorizes the company to purchase or lease a ferry franchise. The fifteenth section authorizes the city of Belleville and the county of St. Clair to subscribe stock in the corporation. The sixteenth section prescribes penalties for injuring the road, etc.

The seventeenth section is one under which the company claim the right to extend their road to and unite it with the Chicago and Mississippi railroad, at or near the city of Alton, and is in these words: "Said company shall have the power to extend to and unite its road with any other railroad now constructed, or which may hereafter be constructed in this state, and for that purpose full power is hereby given to said company to make and execute such contract with any other company as will secure the objects of such connection."

The two remaining sections authorize the company to borrow money and limit the time within which the road shall be completed.

Upon the construction of this seventeenth section must depend the decision of the question now presented. In seeking for the intention of the legislature as expressed in any portion of a law, it is eminently proper to look into the whole law, as one

portion may frequently be designed to extend, qualify, or limit another portion. Hence I have stated the substance of the whole act, so far as it can possibly affect this question.

It is undoubtedly true that the primary object of the legislature in the passage of this charter, and that which was most in their contemplation, was to provide for and secure the construction of a railroad from the city of Belleville to Illinoistown. The details of the bill are framed with direct reference to that object. To induce this, the rights, privileges, and franchises specified in the charter were granted to the corporation. These constitute the consideration offered to the company to induce them to construct the work, and for these the public was to derive a benefit in the use of the road. By accepting the charter, the company became obliged to construct the road between the two specified points at all events, and the legislature in the charter said, If you will do this, you may, if you choose, extend your road beyond the specified location. This right to extend as well as the right to charge tolls was undoubtedly designed as an inducement to secure the construction of the road as specified. The one is as sacred a right as the other, and secured by the same contract, and it is as much our duty to protect it. The same may be said of the right to purchase and hold coal lands, to work the coal mines, and to build "branch roads." The question is, How far did the legislature agree that the company might extend their road? The charter gives this answer: "Said company shall have the power to extend to and unite the railroad with any other railroad now constructed, or which may hereafter be constructed in this state." To undertake to prove by argument what is the meaning of this provision is to me like an attempt to demonstrate by reasoning how many inches there are in a foot.

The authority to extend is general, to any other road, with this restriction, that the other road shall be "in this state." The expression of this limitation shows how far it was the design of the legislature that this power should be limited. Otherwise the expressed limitation was worse than useless. It is certainly possible that the legislature intended to grant the right to extend this road to and unite it with any other road which the company might select, within the prescribed limits; and if such was their design, what more appropriate language than this could have been used to express that intention? Grant the possibility of such an intention, and we are forced to the conclusion that they did so intend, unless in some other part of the act they have expressed a further limitation, showing a different intention.

A very ingenious effort was made, upon the argument, to show from other provisions of the charter that the legislature did not mean what they said, but that something less was intended; that they intended to restrict the limits of the right to extend within the county of St. Clair. I will notice all of the clauses of the charter relied on to establish this limitation.

The first is the provision in the fourth section, that the awards of the commissioners to assess the damages for the right of way should be recorded by the corporation in the circuit clerk's office of St. Clair county. In the same section is also a provision that notice should be published in some paper in that county of the intention of the company to apply to the governor to appoint such commissioners. And again, in the same section is a provision that the possession of the company should not be affected by an appeal from the award of the commissioners, and that the owner of the land should not be allowed to take an appeal or prosecute a writ of error, unless he would stipulate that the company might retain the possession upon their giving bond with security, to be approved by the clerk of the circuit court of St. Clair county, conditioned to pay the damages, etc. It was assumed upon the argument that these provisions made it necessary that all appeals from the awards of the commissioners should be taken to the circuit court of St. Clair county, or at least that the legislature so understood it. This, however, by no means necessarily follows. Nothing is said about the jurisdiction of such appeals, or the mode of taking them. All of that is provided for in the law of 1845, and is left unchanged by anything to be here found. The only object of this provision is to affect the question of possession, in case an appeal is taken. By the law of 1845, if the company take an appeal, they must give bond that they will pay the damages which shall be adjudged against them; and by the charter, if the owner of the land takes an appeal, he shall stipulate that the company may retain the possession upon their giving a bond with security, to be approved by the clerk of the circuit court of St. Clair county, to pay the damages, etc.

If they do not give this bond, the appeal proceeds the same as in other cases, and the only effect is that they lose the possession. The appeal is perfected without this bond, which need not necessarily be filed with and which constitutes no part of the appeal papers. The provision, then, that this bond must be approved by an officer in St. Clair county, in no way interferes with an appeal to be taken to the circuit court of Madison county.

The office of the company is located in the city of Belleville, and there may have been a propriety in requiring the bond which entitles the company to the possession of the premises to be approved by an officer residing in the same place. So, too, of the publication of the notice of an intention of the company to apply to the governor for the appointment of commissioners. That had no connection with an appeal, nor did it prevent the governor from selecting commissioners from Madison or any other county. It was a matter of arbitrary discretion with the legislature to determine in what paper the notice should be published, and they might as rightfully have selected a paper in Alton, or St. Louis even, as in St. Clair county. Nor does the fact that the award of the commissioners is required to be recorded in the office of the clerk of the circuit court of St. Clair county determine anything as to the location of the premises upon which the award is to be made. It is true that such record might operate as constructive notice to third persons of the right of the corporation to occupy the land, but such notice is effectually given by the actual possession of the company, by the construction of the road. The most substantial purposes of such record is the preservation of the evidence of the title of the company, and it may have been thought convenient to have that preserved by a record at the place of the home office of the company.

But these suggestions are made rather with the purpose of showing that there is no actual incongruity between the provisions of the charter above adverted to and a proceeding to acquire the right of way in counties other than St. Clair, than because I suppose they were framed with any particular reference to the exercise of the right conferred in the seventeenth section to extend the road beyond the termini specified in the charter. All of the details of the bill were framed with particular reference to the specified road, to secure the construction of which was the primary object of the legislature in the passage of the law, rather than with express reference to the exercise of an undefined power which is expressly granted, but in the exercise of which the legislature have manifested no particular interest; and this being the case, it is remarkable, indeed, that these details do not in some substantial way interfere with the exercise of a power granted in such unlimited terms, and without a particular reference to which they were undoubtedly prepared. Even were there inconsistencies under such circumstances to the extent supposed, we should hardly be justified in

depriving the company of a right which is given in terms so plain and absolute that there is no room even to doubt of their meaning, when there is no provision of the law which has the appearance of a design to limit or explain them. One portion of a law may undoubtedly qualify, restrain, or even suspend another portion, but in order to have that effect, it must appear that it was framed with that intention. Can any one reasonably suppose that these provisions of the charter providing for the recording of the award, the publication of the notice, or the approval of the bond, which may be done at any time after the appeal is perfected, were inserted with the view of limiting the power granted in the seventeenth section, so as to prohibit the company from extending the road beyond the limits of St. Clair county, when that section says they may extend to and connect with any other road in this state? It is evident that those provisions were inserted without any reference to or a thought of this right of extension, which is inserted in a subsequent and a separate part of the charter. Had such a restriction been intended, it would have been provided for in other and express terms, and not been left to a more than doubtful implication, eminently calculated to deceive and entrap those who were invited to expend their money upon the good faith of the state in a public enterprise.

But we were referred to legislative history, to show that this power of extension was not designed to confer so broad a right as the language imports. Whatever else may have been granted or refused by this legislature, it was not pretended on the argument, nor am I advised that such is the fact, that they or their predecessors ever refused to sanction the construction of a railroad between Alton and Illinoistown, nor am I aware that a charter specifying such a road was ever asked for. But granting that it had been, and refused, and it would go but very little way to prove that the legislature did not mean what they have expressly declared. Nothing is more common than to see a measure defeated in one form to-day and granted in another to-morrow. Nor can the presumed or even well-known views of all the members of the legislature be allowed to repeal an express provision of a law, or to control its construction. The law alone can speak the legislative will. When the courts shall be driven to the lobbies of the legislature to learn the sentiments of the members, for the purpose of construing the laws, a new rule of construction will have been adopted. But above all others, this class of legislation should be construed by its

own terms and without reference to extraneous circumstances, and should be so framed as not to mislead or deceive those to whom it is addressed. Here is a law, not designed for the general government of our own citizens alone, who may be supposed to be familiar with our legislative history, and with the general sentiments of their representatives, but it is also a proposition for a contract, addressed to capitalists throughout the world, ignorant as they must be of all these extraneous circumstances, and who must necessarily rely alone upon the terms of the law to determine the nature and character of the proposition. In such a case justice to them and justice to the integrity of the state require that we should look to the terms of the law for its meaning, and inquire how it was fairly understood by those to whom it was addressed, and who have accepted and acted upon it, and thus become parties to it. There is, however, nothing in the history of our legislature, so far as I understand it, to warrant the supposition that had a sanction to this particular route been asked for it would have been refused. No one can ever know what particular route it was the design or expectation of the legislature would be taken in the extension authorized in such general terms. Some members may have expected one route would be taken, and some another, while the minds of others were not fixed upon any particular route; and it is very certain that all those who voted for the law had not agreed upon or contemplated any particular route, else that route would have been adopted and specified. The road, to a certain extent, was agreed upon and specified; beyond that an indifference is manifested, indicating that it was not supposed to be prejudicial to the public interest to extend it to and unite it with any other road in the state which the company might select. Whether we agree with the legislature in the propriety of making so broad a grant of powers, it is unnecessary to say. The responsibility is with them, and not with us.

But even admitting that we felt the utmost perfect moral certainty that the legislature never did intend to sanction this particular extension, and it by no means follows that we may refuse to give effect to a power thus unintentionally granted. Numerous statutes might be referred to, the effect of which is entirely different from anything which could have been designed, and yet the courts must give them full effect. A reference to one will suffice. In 1847 our legislature passed a law increasing the punishment for manslaughter, and repealing the old law

without any saving clause. The effect was to turn loose all those who were guilty of that crime, and who were not yet convicted; and under its provisions several escaped. I was obliged to arrest one judgment after conviction and set the criminal free, and yet I never supposed, and no one ever supposed, that the legislature ever contemplated such a result. The design of the new law was to increase and not to remit the punishment for that crime, and the remission was the result of an oversight. If it be said that there was no legislative intention on the subject because the particular effect was not thought of, the same reply is conclusive in the case before us. Either the legislature did not think of the road being extended to Alton, or else it was designed to grant the power to extend it there. Had there been an affirmative intention not to allow it, there is no room for doubt that it would have been expressly prohibited or excepted when the general power was granted. Is not the terminus of the Chicago and Mississippi road at Alton in this state? As a geographical fact, it is so, and if so, then the law says they may go there and unite with that road. Is not a railroad as much a geographical designation as a city, and suppose the charter had said they might extend to and unite their road with any city in this state, might they not have gone to Alton? And yet the legislature as well knew that there was a railroad at Alton as they knew that there was a city there. Tell me why the power to go there now is not as ample as it would have been then. It requires no more liberal construction in the one case than in the other. Indeed, it is no construction at all, for there is no room for construction. It is simply repeating what the legislature has said. They have granted the power, and it is our duty to protect it.

Something was said upon the argument about connections with other roads, and that, at most, this seventeenth section allows of but one extension for the purpose of connecting with another road. There is certainly nothing in this case showing that any other connection than the one mentioned in the plea is contemplated. If the facts are that the company had previously adopted another extension, for the purpose of connecting with a different road, a replication should have shown it, when an entirely different question would have been presented. We may know outside of the record that in order to reach Alton, this road must cross the Ohio and Mississippi road; but the mere crossing of another road does not necessarily form a connection with it, such as is contemplated in this section. That

means such an arrangement as to pass cars, freight, and passengers conveniently from one road to the other. But there is nothing in this record tending to show that this right to extend to and unite with another road has been exercised and exhausted.

The constitutional objection to the law remains to be considered. This, we are of opinion, is not well taken. The constitution provides: "And no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." That this is a private law, within the meaning of this provision of the constitution, we have no doubt. It was to prevent abuses in this class of legislation that this provision of the constitution was adopted, and the legislature could not evade its effect by simply declaring the act to be a public law, as was done in this case. The first inquiry, then, is, Does this law embrace more than one subject? The subject of this law is the incorporation of a railroad company. No other subject is introduced into the law, and but one company was created by it. But it was urged that two roads were authorized to be constructed by the law, if this extension is sustained. Even admitting that this would make the law obnoxious to the constitutional objection, the fact does not sustain the objection. With the extension to Alton there will be but one continuous road, and that on a much straighter line than many other roads in the state. If we are to look at the line of road authorized to be constructed, for the purpose of determining whether the bill embraces more than one subject, we shall find this law as free from objection as most others of a similar character, and much more so than some others.

Take, for instance, the law creating the Illinois Central Railroad Company, providing for the construction of a main trunk, and the Chicago and Dubuque branches, the former of which projects from the main road over two hundred miles from its terminus at Chicago, presenting the same objection in a much higher degree. And there is another feature in that charter which is not found in the one before us. That grants not only the necessary powers for the construction of the road, but it also contains a grant to the company of over two and half millions of acres of land. There would be much more propriety in saying that here are two distinct subjects contained in the law, and yet a little reflection will convince us that even that law contains but one subject, and that is the incorporation of a company for the construction of a railroad, to promote which object alone all of the various provisions are introduced. Much

less plausible objections, however, are urged against the charter now before us. Should we hold this law to be unconstitutional for the reason urged, but few railroad charters in this state could survive the test.

The title of the bill is, "An act to incorporate the Belleville and Illinoistown Railroad Company." This is not only a literal but it is also a substantial compliance with the constitution. The subject and the object of the law was to incorporate a railroad company, the name of which is distinctly given in the title of the bill. But the name of the company does not give a full description of the road authorized to be constructed. There is no constitutional provision requiring that this should be done. Should we require that, it would be equally necessary to require the title to state all of the other powers granted by or provisions contained in the charter, for they are as much a part of the object of the law, and thus the title would have to be nearly as long as the law itself, else some one might complain that he was misled by it. There is probably not a charter of any kind in the statute-books which is not liable to this objection. The "Illinois Central" gives no accurate idea of the location and extent of that road and its branches, and the "Chicago and Mississippi" would apply equally to any of the six or seven roads extending from Chicago to the Mississippi river, and the "Ohio and Mississippi" tends actually to mislead as to the location of that road, for it nowhere touches the state of Ohio or the river having that name.

This provision of the constitution must receive a fair and reasonable construction; one which will repress the evil designed to be guarded against, but which, at the same time, will not render it oppressive or impracticable. The names of corporations have ever been arbitrary or fanciful, and they probably ever will be. They most generally, it is true, give some idea of the purposes of the corporation, but necessarily in the most general way. We are of opinion that this law embraces but one subject, which is expressed in its title, and that it must be sustained.

The circuit court erred in sustaining the demurrer to the plea, and its judgment must be reversed, and the cause remanded.

Judgment reversed.

TREAT, C. J., dissented.

RULES FOR CONSTRUCTION OF STATUTES.—The intention of the legislature is to control in the construction of statutes: *People v. Utica Ins. Co.*, 8 Am.

Dec. 243; *Oradoff v. Turman*, 21 Id. 608; *State v. Baltimore etc. R. R.*, 38 Id. 317; but the intent ought not to be sought for outside the statute, unless the words are doubtful and uncertain: *Salling v. McKinney*, 19 Id. 722. That construction should be preferred which best harmonizes the statute with the constitution: *Bloodgood v. Mohawk etc. R. R.*, 31 Id. 313; *Bailey v. Philadelphia etc. R. R.*, 44 Id. 593. The principal case was cited in *Harrington v. Smith*, 28 Wis. 59, to the point that in the construction of a statute every part of it must be viewed in connection with the whole, and in addition, it must be construed so as to make all parts harmonize, if practicable, and give a sensible and intelligible effect to each; see also, on this point, *Montesquieu v. Heil*, 23 Am. Dec. 471. In Cooley's Const. Lim. 58, it is said: "If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which will make some words idle and nugatory," citing the principal case among others; and see this language quoted in *Cory v. Carter*, 48 Ind. 338, and its authorities there cited.

CONSTITUTIONAL REQUIREMENT THAT NO LAW SHALL EMBRACE MORE THAN ONE SUBJECT, WHICH MUST BE EXPRESSED IN TITLE: See *Martin v. Broach*, 50 Am. Dec. 306, and note. In *Ross v. Chicago etc. R. R.*, 77 Ill. 131, the principal case was followed in holding that the charter of a railway company will not be subject to the constitutional objection of embracing more than one subject from the fact that it authorizes the construction, etc., of one or more extensions of the principal line, in different directions. An act is not in conflict with this constitutional requirement when it embraces subjects germane to its principal object expressed in its title: *Erlinger v. Boneau*, 51 Id. 100; *Burke v. Monroe Co.*, 77 Id. 614; *O'Leary v. County of Cook*, 28 Id. 542, *per* Breese, J., dissenting; see also *Town of Abington v. Cabeen*, 106 Id. 204, 206; *Unity v. Burrage*, 103 U. S. 458; *Walnut v. Wade*, Id. 692; S. C., 2 Morrison Trans. Dec. 670. So, under an act entitled "An act to amend the act to incorporate the city of Muscatine," it is legitimate for the legislature to extend the limits of the city, or ingraft any other provision not entirely inconsistent with the purpose of amending the charter then in force—all citing the principal case. In *State v. Young*, 47 Ind. 167, in commenting upon *O'Leary v. County of Cook*, *supra*, where it was held that under an act entitled "An act to incorporate the North Western University," a section which imposed a penalty for selling liquor within four miles of such university was embraced by the title, it was said that the principal case, among other Illinois cases, was based upon almost as liberal a rule of construction. The principal case was further cited in *O'Leary v. County of Cook*, 28 Ill. 543, *per* Breese, J., dissenting, to the effect that the supreme court of Illinois has leaned in favor of the validity of private acts when the subjects of the acts were multifarious.

BAKER v. COPENBARGER.

[15 ILLINOIS, 103.]

DEVISE MUST BE TREATED AS OF MONEY AND NOT OF LAND, when by the provisions of a will real estate was to be converted into money, and that money distributed among the devisees; nor does it make any difference in this respect that the legal title descended to the devisees to whom the money is to be paid, or that the land is sold.

DEVISEES MAY ELECT TO TAKE LAND ITSELF INSTEAD OF MONEY, if all are competent to elect, where a devise is made of money to be produced by the sale of land; but the character of the devise can not be thus changed from money to land except by the concurrent action of all the devisees.

FEME COVERT MAY ELECT TO TAKE LAND INSTEAD OF MONEY, into which the land is directed by will to be converted; but the election can only be made under the same forms and solemnities as by law are required to enable her to convey her fee.

NAKED LEGAL TITLE, HELD IN TRUST, CAN NOT BE SOLD ON EXECUTION at law.

EXECUTION CAN NOT BE LEVIED UPON HOPE OR PROBABILITY that money may become due and payable to the defendant in execution upon the happening of some future event.

ERROR. The facts are stated in the opinion.

J. C. Conkling, for the plaintiff in error.

Stuart and Edwards, and S. T. Logan, for the defendants in error.

By Court, CATON, J. By his last will and testament, James Newell devised the premises in question to his wife for life; then the will proceeds: "And that at the death of my said wife, all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may remain unexpended, be sold, and equally divided among my children, Martha Copenbarger," and four others, naming them.

Conveyances were made by several of the devisees to William D. Newell, one of the devisees, of their interest in the premises, to which objections were made, but which, with the view we take of this case, it is unnecessary to examine. Although there was some attempt made by the testimony of Hooper to show that Mrs. Copenbarger had at one time agreed to sell her interest in the premises to William D. Newell, yet there is not a pretense for saying that she ever made a valid conveyance for that purpose. Hooper swears that he did, during the life-time of her husband, draw up an agreement by which she agreed to sell her interest to William for two hundred dollars, which was to be paid in eight years, and if not promptly paid at that time, all claim under the agreement, and all payments, were to be forfeited, and the witness thinks this agreement was signed by Mrs. Copenbarger and her husband, and left in the hands of old Mrs. Newell, but that the agreement was never acknowledged. Without an acknowledgment she could make no valid conveyance of the estate, and hence it is unnecessary to inquire

whether he ever made payment according to the terms of the agreement. There was certainly no legal conveyance by Mrs. Copenbarger to her brother William.

Here was a devise of real estate, which, by the provisions of the will, was to be converted into money, and that money distributed among the devisees. This, it is admitted on all hands, must be treated as a devise of money, and not of land. This rule is so well settled that it is not necessary even to refer to the authorities on the subject. The legal title to the land is held in trust for the purposes specified in the will, whether the title is left by the will to descend to the heirs by operation of law, or whether by the will it is vested in a trustee; nor does it make any difference in this respect that the legal title descended to the devisees, to whom the bequest is to be paid in money when the land is sold. There can be no doubt, however, where a devise is made of money to be produced by the sale of land, as in this case, that by the election of all the devisees they may take the land itself instead of the money, where all are competent to make such election; but it is equally clear that the character of the devise can not be thus changed from money to land except by the concurrent action of all of the devisees, for as each has a separate right to insist upon the bequest as provided by the will, their claim can not be defeated except upon the election of all; hence each must have the uncontrolled right to have the land sold, and to receive his share of the proceeds of the sale of the land.

If four of the five devisees could elect to take the bequest in land instead of money, they could, without the consent of the fifth, compel her to take an undivided fifth share of the land instead of a fifth part of the money for which the whole land would sell. The fifth, therefore, has the right to insist that the land shall be sold, and that, too, unincumbered and unembarrassed by any act done or suffered by any of the other devisees. If one of the devisees could sell his interest in the land, and convey a valid title to his fifth, and another could suffer an execution to be levied upon his undivided fifth, and sold, and a good title conveyed to the purchaser, it is manifest that the title would become so embarrassed as to prejudice the interests of the other devisees; for the sale must be of an interest in the land, and not of money to be produced from the land. If they have a right to insist upon a sale, there can be no doubt that they have a right to have as perfect a title conveyed under that sale as descended from or was devised by the testator. It is com

petent for a *feme covert* to elect to take the land instead of the money; but that election can only be made under the same forms and solemnities as by law are required to enable her to convey her fee: *Oldham v. Hughes*, 2 Atk. 452; *May v. Roper*, 4 Sim. 360; Jarman on Wills, 538; *Rice v. Bixler*, 1 Watts & S. 455. There is no pretense that this was done by Mrs. Copenbarger; hence she has the undoubted right to have the land sold, and her proportion of the proceeds paid to her.

The question, however, will still arise, whether the purchaser at the sheriff's sale will be entitled to receive that portion of the money which by the will is devised to William Newell. This depends entirely upon the question whether he had any interest in the land which was subject to be levied upon under the execution. If the plaintiff in the execution had a right to levy upon the land, he had a right to sell it, and to convey a good title in spite of the other devisees. This we have already seen he could not do. The reason of this is obvious. A portion of the legal title had descended to and vested in him, not as owner but as trustee, to be sold, and the proceeds distributed according to the directions of the will, and that title was held as strictly in trust as if he was to have no interest in the proceeds. The land was not devised to him, but the money was. His only claim of interest was in that money, and even in that he had no certain interest till after the death of his mother, who, by the will, was authorized to sell it. The naked legal title, then, which he thus held in trust, certainly could not be sold on execution at law. Could his equitable title? That was derived solely from the will. By the will he derived no title to the land, either legal or equitable. The devise, as before suggested, was not of the land, but of money. The bequest was of money, not presently, but in expectancy, and even then not certain, but contingent upon his mother dying without disposing of the land. Till that event happened, he had no certain interest either in the lands or its proceeds. After that event he had an expectancy of money, but nothing more. There was even yet no money due him under the will, nor could it become due till it had been produced by a sale of the land. Till then he could have no right to demand it of any one. The question, then, simply is, Can an execution be levied, not upon money present, nor even upon a claim for money presently due and payable; but upon a hope or probability that money may, upon the happening of some future event, become due and payable to the defendant in the execution? The very statement of the

proposition conveys to every legal mind the most conclusive answer. We are of opinion that the sale under the execution conveyed no title whatever, either in the land or its proceeds, as to any of the devisees, and the decree of the circuit court must be affirmed.

Decree affirmed.

EQUITABLE CONVERSION.—Land directed by will to be sold, and the proceeds thereof distributed, is regarded in equity as money: *Tazewell v. Smith*, 10 Am. Dec. 533; *Burr v. Sim*, 29 Id. 48; *Kane v. Gott*, 35 Id. 641; *Proctor v. Ferebee*, 36 Id. 34; *Smilie v. Biffle*, 44 Id. 156. The principal case is cited to this proposition in *Jennings v. Smith*, 29 Ill. 122; *Rankin v. Rankin*, 36 Id. 299; *Heslet v. Heslet*, 8 Ill. App. 26; but if land is directed to be sold on a certain condition, it is not thereby converted: *Evans v. Kingsberry*, 14 Am. Dec. 779. The surplus of a fund obtained from the sale of a lunatic's real estate, under order of court, for the payment of his debts, remains real estate, and descends to his heirs: *Lloyd v. Hart*, 45 Id. 612; but in *Withers' Appeal*, 16 Id. 488, it is held that an heir's interest in land is an estate in realty, after an order of court to sell the same, until the sale has taken place.

PERSONS ENTITLED TO PROCEEDS OF LAND DIRECTED TO BE CONVERTED MAY ELECT TO TAKE LAND: *Burr v. Sim*, 29 Am. Dec. 48, and note; *Proctor v. Ferebee*, 36 Id. 34; *Hannah v. Swarner*, 38 Id. 754 (election by husband). If there are several distributees the election must be by all: *Jennings v. Smith*, 29 Ill. 122; *Ridgeway v. Underwood*, 67 Id. 430; *Nicoll v. Scott*, 99 Id. 539; *Heslet v. Heslet*, 8 Ill. App. 26; citing the principal case.

CONTINGENT, UNCERTAIN, EQUITABLE INTEREST CAN NOT BE SOLD ON EXECUTION.—The principal case is an authority for this proposition in *Bowman v. People*, 82 Ill. 250, 251; but in *Ridgeway v. Underwood*, 67 Id. 430, the principal case was distinguished in that it holds that the interest of distributees in land directed to be converted is not subject to levy and sale under execution, and not that such interest is not assignable.

RALSTON v. WOOD.

[15 ILLINOIS, 159.]

ORDER OF PROBATE COURT IS BINDING AND CONCLUSIVE UPON ADMINISTRATOR, in adjudging that he pay over money in his hands to the heir, when the administrator was a direct party to the order, and was before the court at the time.

ORDER OF PROBATE COURT IS AS CONCLUSIVE AGAINST SURETY AS ADMINISTRATOR, by section 126 of the Illinois statute of wills, when it adjudges that the administrator pay over moneys to a person entitled thereto; and if not complied with, entitles the person in whose favor it is made to recover upon the administrator's bond against both principal and surety.

SUIT IS COLLATERAL ACTION WHEN BROUGHT UPON ADMINISTRATOR'S BOND for failure of the administrator to comply with a judgment of the probate court to pay over moneys to a person entitled thereto; and is founded as well upon the judgment as upon the bond itself; and when the judgment is offered in evidence, it can not be inquired into by those affected by it, except for fraud.

REMEDY OF SURETY ON ADMINISTRATOR'S BOND IS APPEAL to the circuit court, under section 138 of the Illinois statute of wills, if he thinks the judgments of the probate court against his principal are unjust, or not warranted by law.

DEFENSE CAN NOT BE INTERPOSED BY SURETY in a suit upon an administrator's bond when it was not set up by the administrator in proceedings against him in the probate court, in which he was ordered to pay over money in his hands to the heir; and it is also too late for the heirs of a co-surety to make it, when they are sued for contribution.

PAYMENT IS EQUIVALENT TO, AND WILL BE TREATED AS, PAYMENT IN CASH, when made in property or securities, if such payment is received as a full satisfaction of the demand.

BILL in chancery. The facts sufficiently appear in the opinion. The complainant obtained a decree in his favor, from which the defendants appealed.

Wheat and Grover, for the appellants.

Williams and Lawrence, and Browning and Bushnell, for the appellee.

By Court, CATON J. In September, 1836, Whitney was appointed administrator of the estate of Pease, and gave a bond as such administrator in the penalty of thirty thousand dollars, with the complainant Wood, and Alexander, the ancestor of the defendants, and two others, who are insolvent, as his sureties. In May, 1847, Whitney exhibited his administration account to the probate court, from which it appeared there was due and owing from him as administrator to Nathaniel Pease, jun., one of the heirs of the intestate, five thousand eight hundred and seventy dollars and fourteen cents, which sum the administrator was adjudged to pay to Pease as heir. Whitney having neglected to pay the money, Pease instituted a suit upon the administration bond against Wood as surety, and in June, 1848, recovered a judgment against Wood for six thousand two hundred and forty-eight dollars and thirty-nine cents damages and costs. This judgment Wood paid off, partly in money, and the balance by giving to Pease his own notes, secured by mortgages on real estate, upon which payment Pease entered satisfaction of the judgment.

In May, 1837, Whitney was also appointed guardian of Nathaniel Pease, jun., and as such, executed his bond in the usual form, in the penalty of forty thousand dollars, with Wood and two others as sureties.

In October, 1840, Whitney rendered an account of his guardianship, from which it appeared that there was then a balance

against him, and in favor of his ward, of eight thousand one hundred and fifty-eight dollars and eighty cents of the moneys which he had received as administrator, after the payment of all debts against the estate. The ward attained his majority in January, 1844, after which he cited the guardian before the probate court, who, in obedience to such citation, appeared before said court, and rendered an account of his guardianship. The court then found and adjudged the guardian to be indebted to the ward in the sum of six thousand nine hundred and fifteen dollars and seventy-four cents; and the court adjudged the guardian to pay that amount to the ward. The order made against Whitney, in 1847, as administrator, and in favor of the heir, and the order made against him in 1844, as guardian, and in favor of the ward, were for the same moneys which had come to his hands as administrator, as a part of the estate of the intestate, and which belonged to the heir as a portion of his distributive share of the estate, after the payment of the debts.

This bill is filed by Wood against the heirs of Alexander, to compel them to make contribution for the amount which Wood has paid as co-surety with Alexander, upon the administration bond. The heirs resist this claim for contribution, upon the ground—1. That although the money was received by Whitney as administrator, yet it was retained by him as guardian, he having been at the time both administrator and guardian, and that Wood fraudulently suffered the judgment to go against him upon the administration bond, in order to compel contribution out of the estate of Alexander, all of his co-sureties upon the guardian bond being insolvent. It is also alleged that the order of the probate court, made in 1847 against the administrator, was fraudulently obtained for the same purpose. 2. It is insisted that the notes and mortgage given by Wood to Pease in satisfaction of the judgment did not amount to a payment for which he has a right to call upon a co-surety for contribution. The charge of fraud is not, in our judgment, sustained by any proof in the record. So far from Wood having been guilty of a fraud in procuring the order of the probate court against the administrator, in 1847, it does not appear that he had anything to do with that proceeding or knew anything of it, either at that time or subsequently, till the institution of the suit upon the administration bond. And so far as we may judge from the record of that suit, it seems to have been defended with energy and in good faith. No fraud having been proved, the question must be determined in the first place upon effect to be given to the judgment of the probate

court, entered in 1847, against the administrator, ordering him to pay over the money in his hands to the heir. That that judgment was binding and conclusive upon the administrator himself, there can be no doubt, for he was a direct party to it, and was before the court at the time, and the court had competent and indeed exclusive jurisdiction to pronounce that order or judgment. The effect of that order upon the sureties of the administrator must depend upon our statute. Section 126 of our statute of wills provides: "If any executor or administrator shall fail or refuse to pay over any moneys or dividends to any person entitled thereto, in pursuance of the order of the court of probate lawfully made, within thirty days after demand made for such moneys or dividends," the executor or administrator may be attached; "and moreover such failure or refusal on the part of such executor or administrator shall be deemed and taken in law to amount to a *devastavit*, and an action upon such executor's or administrator's bond, and against his or their securities, may be forthwith instituted and maintained, and the failure aforesaid to pay such moneys or dividends shall be a sufficient breach to authorize a recovery thereon." If we are to give any force to language, this statute certainly makes that order as conclusive against the security as against the administrator himself. That judgment or order is made evidence of a *devastavit*, if not complied with, and entitles the person in whose favor it is made to recover upon the bond against both principal and security.

The suit upon the bond is a collateral action, founded as well upon that judgment as upon the bond itself, and when the judgment is offered in evidence, like any other judgment of a court of competent jurisdiction, it can not be inquired into by those affected by it, except for fraud. Although Wood was not a party directly to that proceeding, yet he was bound by it, for the simple reason that he agreed to be bound by it when he entered into the bond; for the law said if he entered into the bond he should be bound by it. This answers every objection of hardship or injustice which might appear to exist, by holding him concluded by a proceeding which he was not notified to defend. By entering into the bond, he not only assumed that the administrator should act with fidelity and discretion in the management of the estate, but he also took the responsibility that he should properly defend any proceeding against him which might be instituted in the probate court. The administrator might do or omit a thousand acts for which the security would be liable, but of which he might be entirely ignorant, or if known, he might be

unable to control in the least degree. The hardship in the one case is no greater than in the other. If he was not willing to take the responsibility of the administrator's conduct and discretion to that extent, he should not have become his security. While the security is bound by the judgments of the probate court against his principal, if he thinks those judgments are unjust, he is by the one hundred and thirty-eighth section of the same statute allowed to take an appeal to the circuit court. And that was the remedy which should have been adopted by the securities in this case, if they thought the order against the administrator was not warranted by law. It is unnecessary to say in this collateral proceeding whether the order made three years before, directing Whitney to pay over to the infant this same money as guardian, would have constituted a good defense to the proceeding in 1847 against him as administrator. That defense was not interposed, and the judgment is as conclusive upon both the administrator and his securities as if it had never existed. It was too late for Wood to make it, when sued upon the bond, as the court then decided, and it is too late now for the heirs of his co-security to make it, when they are sued for contribution. If any doubt could be entertained as to the true construction of our statute, the great number of decisions in other states upon similar statutes referred to upon the argument would settle it beyond controversy.

But the statute is too plain to require authority, or to admit of doubt. The only remaining question is, whether Wood has paid this judgment in such a way as to entitle him to call upon the heirs of his co-security for contribution for the whole amount of that judgment. The judgment was for six thousand two hundred and forty-eight dollars and thirty-nine cents and costs. He paid down in cash one hundred and three dollars and twenty-five cents, gave one note for seven hundred dollars, payable in April, 1849, and notes for the balance, payable in eleven equal annual installments, abundantly secured by mortgage upon real estate, and which notes have been paid as they have respectively fallen due. This was accepted by the judgment creditor, as a full payment of the judgment, and a receipt to that effect was given, and satisfaction of the judgment entered of record.

We consider it too well settled by authority to admit of question at this day, that where one person is obligated to pay money for the use of another, a payment made in any mode, either property or negotiable paper or securities, if such payment is received as a full satisfaction of the demand, it is equivalent to

and will be treated as a payment in cash. Upon this point, a bare reference to a very few of the many authorities with which the books abound will be sufficient: *Witherby v. Mann*, 11 Johns. 518; *McLellan v. Crofton*, 6 Greenl. 307; *Randall v. Rich*, 11 Mass. 494; *Pearson v. Parker*, 3 N. H. 366; *Atkinson v. Stewart*, 2 B. Mon. 348. There are a few decisions which would seem to conflict with this rule, but they are overborne by such a weight of authority that the principle may be considered as firmly settled. Where the payment is received as a complete satisfaction, and the debt or obligation is extinguished, it is a matter of no moment to the person to whose use the payment was made whether it was made in money, property, or obligations. The benefit to him is the same, and his obligation to refund should be the same.

No other questions being raised as to the correctness of this decree, and these being decided in favor of the complainant, the decree must be affirmed.

Decree affirmed.

CONCLUSIVENESS OF ORDERS OF PROBATE COURT: See *Bland v. Muncaster*, 57 Am. Dec. 162, and note.

SURETIES' LIABILITY ON ADMINISTRATION BONDS: See *Commonwealth v. Stub*, 51 Am. Dec. 515, and note, where the subject is discussed at length.

SURETIES, WHEN BOUND BY JUDGMENTS AGAINST PRINCIPALS: See *Parkhurst v. Sumner*, 56 Am. Dec. 94, and cases in note. The principal case was cited in *Stone v. Wood*, 16 Ill. 189, to the point that sureties of administrators are concluded by judgments of probate courts fixing the indebtedness of their principals; and followed on the same point in *Housh v. People*, 66 Id. 182; and see *Ream v. Lynch*, 7 Ill. App. 168, to the same effect with reference to the surety on a guardian's bond. As to the liability of sureties on administration bonds, see *Commonwealth v. Stub*, *supra*, and note.

JUDGMENT, WHETHER SUBJECT TO COLLATERAL ATTACK.—When not subject: See *Skinner v. Moore*, 30 Am. Dec. 155, and prior cases in note; *Tarbox v. Hays*, 31 Id. 478; *Banister v. Higginson*, 32 Id. 134; *Atkins v. Kinnan*, Id. 534; *Fisher v. Bassett*, 33 Id. 227; *Jackson v. Astor*, 39 Id. 281; *Swiggart v. Harber*, Id. 418; *Brown v. Wadsworth*, 40 Id. 674; *Burke v. Elliott*, 42 Id. 142; *Lowber & Wilmer's Appeal*, Id. 302; *Thacker v. Chambers*, Id. 431; *Sutherland v. De Leon*, 46 Id. 100; *Witt v. Russey*, 51 Id. 701; *Lynch v. Baxter*, Id. 735; *Young v. Lorain*, 52 Id. 463; *Reed v. Vaughan*, 55 Id. 133; *White v. Merritt*, 57 Id. 527. When it may be attacked collaterally: See *Nason v. Blaisdell*, 36 Id. 331, and note; *Swiggart v. Harber*, 39 Id. 418; *Dougherty's Estate*, 42 Id. 326; *Doe v. Tupper*, 43 Id. 483; *Horner v. Doe*, 48 Id. 355; *Vose v. Morton*, 50 Id. 750; *Caldwell v. Walters*, 55 Id. 592.

SECURITIES AND PROPERTY WHEN PAYMENT.—As to notes being payment, see *Hatch v. Barnum*, 56 Am. Dec. 59, and note referring to other cases. Negotiable paper received in satisfaction of former indebtedness is a payment thereof. The principal case is cited to this proposition in *Gage v. Lewis*, 68 Ill. 618; *Yates v. Valentine*, 71 Id. 644; *Wilkinson v. Stewart*, 80 Id. 58; and

whether executed to a third person at the instance of the creditor, or to the creditor himself: *Smalley v. Edey*, 19 Id. 211; the last case is cited in *Leake v. Brown*, 43 Id. 376, as holding this, and as citing the principal case; but it was distinguished where a certificate of deposit was not taken in payment of a prior debt, nor at the creditor's instance. Giving a bond in satisfaction of a judgment is in law a payment of it: *Cox v. Reed*, 27 Id. 438; and see *Gillilan v. Nixon*, 26 Id. 52, as to the responsibility for the payment of a judgment by an extension of time. But where anything else than payment in cash is accepted as satisfaction, it must appear that such was the intention of the parties: *Flower v. Elwood*, 66 Id. 444, all citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Stone v. Wood*, 16 Ill. 183, *per* Scates, J., dissenting, to the point that judgments are conclusive upon parties and privies, and those deriving title through them, upon the matters investigated and involved in the issues in the particular cause; and (p. 184) to the point that sureties on administration bonds may appeal from judgments on settlement of administrators' accounts; in *Hanna v. Yocum*, 17 Id. 388, to the point that county courts, though not of inferior, are of limited jurisdiction in many respects, but their judgments are final or conclusive on all matters within them; and see also *Ream v. Lynch*, 7 Ill. App. 168.

WARREN v. PRESIDENT ETC. OF THE TOWN OF JACKSONVILLE.

[15 ILLINOIS. 236.]

PUBLIC IS EVER-EXISTING GRANTEE, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them.

MODE OF MAKING DEDICATIONS TO PUBLIC IS IMMATERIAL: the intention of the party, manifested by express consent or acquiescence in the user, will govern in determining whether it be a dedication.

PRIVIES IN ESTATE ARE BOUND TO SAME EXTENT AS GRANTORS, by deeds and acts under them; and it is not within the power of either to resume a grant to the public after the public have entered upon the use designed nor while it is so used.

DEED CAN NOT BE DELIVERED AND ACCEPTED PARTIALLY, for the purpose of conveying title to the grantee, and yet so as not to give effect to its conditions, recitals, and limitations.

INSTRUCTION IS FAULTY IN ASSUMING TITLE IN PLAINTIFF, when that is the question in controversy.

PRESUMPTION OF DELIVERY AND ACCEPTANCE OF DEEDS DULY ACKNOWLEDGED AND RECORDED WILL BE INDULGED IN, and that parties and privies, as well as the public, are acquainted with their contents. Whoever questions any of these facts must assume the burden of proving them.

RIGHT BY PRESCRIPTION CAN NOT BE RAISED AGAINST OWNER'S CONSENT; but the use may be so long unobjected to as to authorize the finding of an implied consent, and to raise the presumption of consent, and even of grant.

GENERAL ISSUE ONLY CAN BE PLEADED IN EJECTMENT, under the Illinois R. S., p. 206, sec. 17; but the same matter may be given in evidence thereunder as in the common-law action of ejectment, except proofs of some fictitious matters which are abolished.

INFERENCE ESTABLISHING RIGHT OF WAY IN PUBLIC OVER UNINCLOSED LAND CAN NOT BE DEDUCED from the mere travel across it by the public without objection from the owner.

EJECTMENT. The facts are stated in the opinion.

M. McConnel and W. Herndon, for the plaintiff in error.

D. A. Smith, for the defendants in error.

By Court, SCATES, J. Warren brought ejectment for a piece of land lying in west half of north-east quarter, section 20, township 15 north, range 10 west, and described and bounded as follows: "Beginning on the north line of the public road, called the state road, and running east and west across said tract of land, and at a point where said public road passes the east line of said tract of land, and running from thence west one hundred feet, more or less, to the east side of a lot of land whereon stands a small church, now called the Universalist church, and from that line thus described said land extends north to the north boundary of said tract of land of which it is a part, retaining the same width as the south front, of one hundred feet." Title is traced and admitted from the United States through the patentee and Dr. Chandler to Joseph Duncan, to the premises. And that in June, 1841, the United States recovered judgment against Duncan, and that the premises were levied upon and sold to Warren on the fifth day of October, 1847, and conveyed by the United States marshal for the district of Illinois. It was also in proof that on the twenty-ninth of October, 1835, Joseph Duncan and wife conveyed one undivided fourth of a piece of land to Thomas T. January, embracing so much of the above premises as lies between the line of Court street on the south and North street on the north (and called Railroad square), and that in said conveyance was this agreement: "And it is agreed that all of said streets, and another street to be called Railroad street, are to run through, and be kept open through, said square; but it is agreed that if a sale of any privilege can be effected to the railroad company, for the erection of buildings on said square, it shall in no case obstruct a street; the proceeds are to be divided, one fourth to said January, and three fourths to said Duncan, and for all other purposes it is agreed the said square shall be kept open for public use."

It was further proven that on the twenty-sixth of September, 1836, Thomas T. January and wife conveyed to Joseph Duncan lots 8, 9, and 10, in Johnson's addition to Jacksonville, and "also all the interest which the said January holds in the rail-

road square" (the lands described in the foregoing deed), "laid off by said Duncan on the lands bought of Dr. E. Chandler, one half of which was deeded by said Duncan to said January, but in reconveying his interests in said square to said Duncan, it is understood that the said Duncan is to open Church street as far north as lot No. 21 in said Johnson's addition, or to North street, and has full power to close the said square, or to sell or dispose of it, as he, the said Duncan, may think proper." It was in proof that Warren had seen this deed before his purchase. That Duncan had a private unrecorded plat of these lands among others, upon which the premises were marked "Duncan's." That part of the premises had always lain open, and part had been used and traveled by the public for three years before Duncan's death, and hitherto, for more than seven years, and was as much in the use and possession of the public as streets by working on the same and claiming it as such. In 1835, a church was built on the lot on the west, and the lot on the east side was inclosed.

The plaintiff excepted to the modification by the court of his seventh instruction, which was as follows: "The question to be determined by this jury is, whether Warren, or any of the former owners of this land, has given and dedicated said land to the public, as a public street of the town of Jacksonville;" and to enable the jury to find that said gift or dedication has been made, it must be proved to their satisfaction that some act has been done by some one of said owners, "or such an acquiescence in the use of the land by some of them," clearly indicating the intention to make said land a public street; and the bare fact that said land was left open, and the people traveled over it, is not of itself sufficient to establish such gift or dedication.

The court refused the following instructions, which was excepted to: 2. Private property can not be taken for public use without due compensation first made to the owner of the same; and this land, having belonged to Chandler and Duncan, and now to Warren, can not be taken, and could not heretofore have been taken, by the incorporation or the people of the town of Jacksonville and converted into a public street, without the consent of said owners or without first paying for said land.

3. The deed from January and wife to Duncan, of certain lots of land in McHenry Johnson's addition to the town of Jacksonville, wherein January recites that Duncan is to open Church street as far north as North street in Jacksonville, and without saying how far south said street is to be opened from North

street, is not sufficient evidence to prove that Duncan did give and dedicate said land to the public as a public street, commencing on the south at State street, and running north to said North street. Said deed is not evidence of anything whatever, unless it is proven that Duncan received said deed from January, and that said recital in said deed was known to Duncan when he received the deed, and that the same was the result of and in pursuance of the contract and agreement made by Duncan with January, as a part of the consideration of said deed and as a part of said contract in the purchase of said lots of land.

4. The incorporation of Jacksonville or the people, being desirous to open a public street through the private property of any citizen, may do so by laying out said street, and having the value of the right of way over the land appraised by disinterested persons, and said value paid for, before said street is opened; but they can not, because said land is left open by the owner, enter upon the land and without the express consent of the owner convert said land into a public street without paying for the land; and length of time, however long said land may be traveled over and used without the consent of the owner, is not sufficient to establish said land as a public street.

The plaintiff also excepted to the following instruction for the defendant: If January and wife made to Duncan the deed offered in evidence by the defendants, and that at the date of that deed Church street was opened from State street to North street, and has so continued from that time up to the time of the institution of this suit, and hath during all that time been used by the public as a street, without let, hinderance, or objection of the owners of the land in controversy in this case, that from these circumstances the jury may infer a dedication of the land in controversy to the public, to be used as a street; and the jury may if they see fit find a verdict for the defendants, notwithstanding the plaintiff may have established his fee-simple title to the land in controversy.

The jury found a verdict for the defendants, and a second new trial was refused.

We shall decide this case upon the question of dedication by January and Duncan, and to which Warren is a privy by deriving title through them, and of which he had both actual and constructive notice. We are of opinion that the recital of the agreement in January's deed to Duncan, reconveying the interest in the Railroad square, is sufficient evidence of a dedication for Church street, from State street to North street, when taken in

connection with the recitals of dedications for similar purposes in Duncan's prior deed to January, and the subsequent acts of the public in using, claiming, and working the same as a street for seven years, three of which were in the life of Duncan, to authorize the jury to find for the defendants to that extent. Duncan had agreed, in conveying this interest to January, that "all of said streets, and another street to be called Railroad street, are to run through, and be kept open through, said square; and a sale of any privilege to the railroad," "shall in no case obstruct a street," and that "the said square shall be kept open for public use."

These facilities of public easements of way through the Railroad square may have been of particular advantage to January as a lot holder, as well as a general advantage to the town and community, and to this end they might constitute an essential element of the value of the interest he acquired under the deed. So again, when he sold the same interest back to Duncan, with three other lots, part of the consideration seems to have been an additional easement of way to the public by extending Church street. This last easement presents a more prominent consideration, in the fact that he consents that Duncan may "close the said square," and thereby destroy all the easements created by Duncan's deed to him.

This street might confer great value to other lots of January, as well as be of great advantage to him in their use and enjoyment. Taking the two deeds together, it is very evident that the parties intended to increase the facilities of their own enjoyment of this and other town property, if they had any, or to add to its value by creating these streets. It would be unjust to allow either party, at pleasure, to despoil the other of these advantages, or to reclaim them of the community after a long use and enjoyment under such an appropriation for their benefit: *McConnell v. Lexington*, 12 Wheat. 582. The public is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them: *City of Cincinnati v. Lessees of White*, 6 Pet. 431.

The mode of making dedications is immaterial. They are not within the statute of frauds, and are good by parol: *Godfrey v. City of Alton*, 12 Ill. 35 [52 Am. Dec. 476]. The intention of the party, manifested by express consent or acquiescence in the user, will govern in determining whether it be a dedication: *City of Cincinnati v. Lessees of White*, *Godfrey v. City of Alton*, *supra*.

Warren is privy in estate with Duncan, and must be bound to the same extent by these deeds and acts under them, and it is not in the power of either to resume this grant after the public have entered upon the use designed, nor while it is so used.

We see no solidity in the objection that the deed contemplated a future act of Duncan to make a dedication. The acceptance of the deed we think sufficient to dedicate, or at least to sustain, a verdict so finding. That Duncan accepted the deed, we are not at liberty to doubt from the proofs. We find this deed on record, the land marked as his on his private map, and the public using the land as a street, some years before his death.

To defeat the dedication upon the ground of non-acceptance of the deed would, indeed, be to defeat the title of Duncan under it. If the deed has not been delivered and accepted, it is inoperative. It might have been delivered to a third person and accepted as an escrow. But it could not be delivered and accepted partially, for the purpose of conveying title to Duncan, and yet so as not to give effect to the conditions and recitals and limitations. We must, under the proofs, presume a delivery and acceptance, and consequently must presume Duncan cognizant of the contents of the deed.

The modification of the seventh instruction we think correct. Such an acquiescence in the use of the public by an owner of land as clearly indicates an intention to dedicate may warrant a jury in finding a dedication under the proofs in this case.

The second instruction refused is faulty in assuming title in Warren, for that was the question in controversy. We see no other objection to it.

The court have already laid down and approved of principles in relation to the acceptance of the deed by Duncan, which militate against the third instruction refused by the court. We must indulge the presumption that deeds duly acknowledged and recorded, have been delivered and accepted, as well as executed by the vendor, and parties and privies, as well as the public, are acquainted with their contents. Whoever questions any of these facts must assume the burden of proving them.

The fourth instruction should have been given. It is very broadly worded, but does not preclude the acquisition of a right by prescription. A right by prescription can not be raised against the consent of the owner; but the use may be so long unobjected to as to authorize the finding of an implied consent, and to raise a presumption of a consent and even of a grant. The instruction given for defendants is correct.

It is objected that this deed is used by way of estoppel under the general issue, which is inadmissible, and that it should have been set up by special plea. Without investigating the doctrine of special pleading in ejectment, we deem it sufficient to refer to the statute of our own state, which provides that the general issue only shall be pleaded; under which the same matter may be given in evidence as under the common-law action of ejectment, except proofs of some fictitious matters which are abolished. R. S. 1845, p. 206, sec. 17.

The verdict is not warranted by the proofs and the law, for that portion of the land lying northward from lot 21, or North street. This portion is not included in the dedication.

The use and occupation of this portion is only about seven years, without any proof of assent or dissent. It was over lands lying uninclosed and in common. While so much land lying in common in this country remains free to public uses and travel until circumstances induce owners to inclose, we can deduce no strength of inference or conclusion from mere travel across it by the public, without objection from the owner. It is neither the temper, disposition, fashion, nor habit of the people or custom of the country to object to community enjoying such privilege until owners wish to inclose.

This use is not shown to have been adverse, and upon a claim of it as an easement, for it does not appear that any owner ever desired to use any part of the tract to which it belonged. We are of opinion that the prescription for a right of way over this portion is not sustained, and that the verdict therefor is not warranted by the evidence.

Judgment reversed, and cause remanded, with *venire de novo*.

TREAT, C. J., concurred in reversing the judgment.

Judgment reversed.

DEDICATION OF LAND TO PUBLIC USE: See *Dwinel v. Barnard*, 48 Am. Dec. 507, and cases in note; *Godfrey v. City of Alton*, 52 Id. 476; *Stacey v. Miller*, 55 Id. 112; *Cole v. Sprowl*, 56 Id. 696. The principal case on questions concerning dedication has been cited as follows: in *Illinois Ins. Co. v. Littlefield*, 67 Ill. 373, to the point that dedication rests in intention; in *Rees v. City of Chicago*, 38 Id. 338; *Alvord v. Ashley*, 17 Id. 369, to the point that the mode of making a dedication is immaterial; in *Rees v. City of Chicago*, *supra*; *Alvord v. Ashley*, *supra*; *Field v. Carr*, 59 Id. 201; *Gerber v. Grabel*, 16 Id. 221; *Hiner v. Jeanpert*, 65 Id. 430, to the points that a dedication may be created by express consent or by acquiescence; but while no presumptions or inferences can be made against those who have neither actual nor constructive notice of a user, every one is presumed to know of and notice the use of a way over his lands: *Dimon v. People*, 17 Id. 422; and mere travel over uninclosed

land without the owners' objection will not create a highway by user or prescription: *Hanson v. Taylor*, 23 Wis. 555, *per* Dixon, C. J., dissenting; *Harding v. Jasper*, 14 Cal. 648; *McWilliams v. Morgan*, 61 Ill. 91; *Kyle v. Town of Logan*, 87 Id. 67.

DELIVERY OF DEEDS WHEN MAY BE INFERRED: See *Rushie v. Shields*, 56 Am. Dec. 436, and notes collecting prior cases. The recording of a deed, although not conclusive as to its delivery, is strong evidence thereof in the hands of an innocent purchaser: *Blight v. Schenck*, 51 Id. 478.

INSTRUCTION IS ERRONEOUS WHICH ASSUMES FACT TO BE PROVED, instead of leaving it to the jury: *Crosier v. Kirker*, 51 Am. Dec. 724, and note.

THE PRINCIPAL CASE WAS ALSO CITED in *Chicago etc. R'y v. Hoag*, 90 Ill. 849, as saying that a right by prescription can not be raised without the consent of the owner; but the use may be so long unobjected to as to authorize the finding of an implied consent, and to raise a presumption of consent and even of grant.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

COE v. SMITH.

[4 INDIANA, 79.]

ADMINISTRATOR OF DECEASED ATTORNEY who in his life-time agreed to defend a certain suit for five hundred dollars, but who died before completing said defense, may recover from the defendant as much as such services are worth. In such a case the action is not upon the contract, but upon the implied promise.

IN ORDER TO RECOVER IN ASSUMPSIT FOR PART PERFORMANCE OF DIVISIBLE CONTRACT, it is not necessary that the contractee should have wrongfully refused to restore to the contractor what he has received under the contract. Such recovery may be had upon contracts for personal services, where it would be impossible to place the parties in *status quo*.

RECOVERY IN ASSUMPSIT FOR PART PERFORMANCE OF EXPRESS CONTRACT must in no case exceed the contract price, or the rate of it for the part of the contract performed.

IN ASSUMPSIT UPON QUANTUM MERUIT FOR SERVICES PERFORMED, the question, "What were the services rendered worth?" is correct, as *prima facie* the benefit of the party receiving the services would be measured by their worth; and the burden is upon him to show the contrary.

ASSUMPSIT. The facts appear from the opinion.

Newcomb, for the plaintiff.

O'Neal, for the defendant.

By Court, PERKINS, J. *Assumpsit* by Smith, administrator of Sweetser, against Coe, for work and labor, etc., performed for the latter by Sweetser, in his life-time. The cause was tried by the court upon the general issue, and a judgment was rendered for the plaintiff for one hundred and seventy-five dollars.

Three special pleas were filed by the defendant, and set aside

by the court on the motion of the plaintiff; but they raised no point in the defense of which the defendant could not have availed himself under the general issue, and the action of the court in reference to them was consequently immaterial.

The facts in the case shortly stated are, that Coe employed Sweetser, a lawyer, to defend a suit at law for him, agreeing to pay him for so doing five hundred dollars. Sweetser labored in the defense for a time, but died before the suit was determined, and Coe employed another lawyer to continue the defense. This suit is by Sweetser's administrator against Coe, not upon the contract, but upon the *quantum meruit*, to recover from Coe the amount that Sweetser's services were worth to him. It is contended that the suit can not be sustained because the contract for the service was entire, and the service has not been fully performed. There are numerous authorities that sustain this position. They decide that in the case of an entire contract there can be no division or apportionment: *Cutter v. Powell*, 6 T. R. 320, in which the administrator of a sailor who had contracted to perform a voyage for a certain sum, and died before its termination, was denied the right of recovering anything for the part performed, may be regarded as a leading case. Kent says, at common law, "if a servant was hired for the month or year, and the service ceased within the time, there was no apportionment of wages for the actual time of service, though the rule operated in some cases most unjustly:" 3 Kent's Com. 471, note.

In some courts, however, this doctrine seems to have been doubted, if not denied. Kent to the observation above quoted adds: "The old rule is now held to be relaxed, and wages it is understood may be apportioned, upon the principle that such is the reasonable construction of the contract of hiring: Lawrence, J., in *Cutter v. Powell*, *supra*; *McClure v. Pyatt*, 4 McCord, 26; *Bacot v. Parnell*, 2 Bail. 424." And Judge Story, in *Brooks v. Byam*, 2 Story, 525, decided in 1843, seems to think the maritime law should have been applied to give a different decision in *Cutter v. Powell*. He says: "The case of *Cutter v. Powell*, 6 T. R. 320, is directly in point; although I entertain considerable doubt whether by the maritime law the contract in that case was not divisible."

But the present suit is not upon the special contract, and does not seek to recover the sum stipulated in it, or any apportionment of it, but it is upon a common count in *assumpsit*, for the purpose of recovering from Coe the reasonable worth of

Sweetser's services to him, and rests on the principle, as laid down by Judge Dewey in *Lomax v. Bailey*, 7 Blackf. 599, "that where one party to a special entire contract has not complied with its terms, but professing to act under it has done for or delivered to the other party something of value to him, which he has accepted, no action will lie on that contract for the work done or thing delivered; but that the party who has been thus benefited by the labor or property of the other shall be responsible on an implied promise arising from the circumstances, to the extent of the value received by him."

This principle received the sanction of this court in the case quoted from, in *Milnes v. Vanhorn*, 8 Blackf. 198, and in *McKinney v. Springer*, 3 Ind. 59; *Bailey v. Epperley*, Id. 72; and *Manville v. McCoy*, Id. 148, November term, 1851, and we adhere to the decisions in those cases. In *Fenton v. Clark*, 11 Vt. 557, it is decided that where A. contracted with B. to labor for him four months from a given day, at ten dollars per month, and to receive no pay until he had worked the four months, and was prevented from completing the four months' labor by reason of sickness, he might recover upon a *quantum meruit* for the services performed; and the case of *Britton v. Turner*, 6 N. H. 481 [26 Am. Dec. 713], is cited with approbation. This decision the supreme court of Vermont reaffirms in *Seaver v. Morse*, 20 Vt. 620.

But it is urged in this case that the doctrine laid down in *Lomax v. Bailey*, *supra*, can only be applied in cases where the benefited party, on the breach of the contract, wrongfully fails to restore to the other party what has been received under it, and thus to place him *in statu quo*; and that there can be no such wrongful failure in contracts for personal services, because the parties, in such cases, can not be placed *in statu quo*; but the authorities will not justify such an idea, for it is not necessary to a recovery in any case that there should be a wrongful refusal to restore to the party in default what has been received, and but few cases occur in which such restoration can take place, and the party knows this fact while receiving the part performance.

In a great majority of the cases where there is a special entire contract for the delivery of articles of property, such as pork, hay, wood, etc., and in which actions are sustained, consumption, or a second sale, takes place as fast, or nearly so, as the delivery, and without the expectation that the contract is to be broken; so that it is out of the benefited party's power, and

without fault on his part, when the breach does occur, to place the opposite party in the condition in which he was when he entered into the contract; but it is not out of his power to make compensation for what he can not return. The case of *Lomax v. Bailey, supra*, where one party had furnished the materials, or a part of them, out of which the other had manufactured for him machines, was one in which the parties could not be placed *in statu quo*. It was not in the power of the receiver of the machines to restore to the mechanic his labor spent in making them. And it is this reception and enjoyment, with the known inability to make specific restoration, upon which an *assumpsit* is raised. The principle is general in its application; it is compensation for benefit received and enjoyed, and not the restoration of the specific article that must take place; and the doctrine of implying an *assumpsit* from circumstances is not new to the law, but is a familiar one. If a man has in his hands the money of another which, in equity, he should pay to him, the law will imply an *assumpsit* to pay it: 2 Greenl. Ev. 87; and why not, if he has received benefit from the property or labor of another, which in equity he should pay for, imply an *assumpsit* to pay for it? He is to pay no more than the amount in which he has been benefited, and this will be determined by the jury, all things being considered: the manner of the breach of the contract, whether with or without cause; the inconvenience and damages resulting, etc.; and the amount recovered must, in no case, exceed the contract price, or the rate of it for the part of the contract performed. This policy would not permit, lest a temptation should be held out to break contracts in an advanced stage of performance, in hopes of higher compensation than might be stipulated for in the contract.

We think the suit in this case may be sustained.

The circuit court permitted witnesses on the trial to be asked the question generally, What were the services of Sweetser, rendered in the suit against Coe, worth? And it is contended here that the court erred in so doing. It is insisted the question should have been, Of what benefit were they to Coe? and undoubtedly this latter would have been a proper question; but as the court, on the trial, also permitted this latter question to be asked, and the further question, what damage there was to Coe in Sweetser's failing to complete his contract, we think no harm was done in permitting the question objected to to be asked. Indeed, we think it a proper question to be put in such a case by the plaintiff, as *prima facie* the benefit to the party

receiving the services would be measured by their worth; and it would seem to be the appropriate business of the defendant to bring out the facts, in his examination, showing that such was not the fact in the particular case.

On the weight of evidence we can not disturb the finding of the court.

The judgment is affirmed, with ten per cent damages and costs.

SUBJECT OF APPORTIONMENT OF CONTRACTS AND RECOVERY FOR PART PERFORMANCE THEREOF is treated at length in note to *Cuthbert v. Kuka*, 31 Am. Dec. 518. This note says: "A familiar and well-settled principle of the common law is, that an entire contract can not be apportioned;" but on page 519: "In some cases it has been held that where, in a contract of service, the person performing the service dies before the time expires, the contract may be apportioned." So part performance of a contract of service will entitle to compensation where entire performance has been prevented by sickness: *Greene v. Linton*, 31 Id. 707. But the general rule is that a *quantum meruit* will not lie for the part performance of an entire contract: *Marshall v. Jones*, 25 Id. 260; *Hayward v. Leonard*, 19 Id. 268, and note; *Helm v. Wilson*, 28 Id. 336, and note. Generally, when party is entitled to recover upon a *quantum meruit* for the part performance of a contract, see *Merrill v. Ithaca and Owego R. R. Co.*, 30 Id. 130, and note; *Gilman v. Hall*, 34 Id. 700; *Porter v. Woods*, 39 Id. 153; *Eldridge v. Rowe*, 43 Id. 41, and note; *Van Rensselaer v. Bradley*, 45 Id. 451. The principal case is cited and followed in *Major v. McLester*, 4 Ind. 591, where the court held that where an attorney agreed with A. to bring suit to have a deed set aside, and A. agreed to pay said attorney one hundred and fifty dollars if the deed was so set aside, but to give him nothing if the deed was not annulled, and the court set it aside as to part of the property and sustained it as to the balance, the attorney was entitled to recover in a *quantum meruit* as much as his services were worth, not exceeding the contract price. It is cited to a similar proposition in *Ricks v. Yates*, 5 Id. 117; *Wheatly v. Miscal*, Id. 142; *Pearsons v. McKibben*, Id. 263; *Mills v. Riley*, 7 Id. 138; *Conwell v. Smith*, 8 Id. 530; *Becker v. Hecker*, 9 Id. 499; *Swank v. Nichols*, 20 Id. 201; see also *President etc. v. Brinkmeyer*, 12 Id. 350; *Hunter v. Leavitt*, 36 Id. 145. The principal case is also cited to the point that the contract price is the proper measure of damages in such actions, in *Slauter v. Whitelock*, 12 Id. 338; *Wolcott v. Yeager*, 11 Id. 87; and in *Gatling v. Newell*, 9 Id. 579, to the point that it is not necessary for the plaintiff in such case to place the opposite party in *status quo*.

WRIGHT v. BROWN.

[4 INDIANA, 95.]

OWNERS OF FLAT BOAT MOORED TO SHORE can recover damages from the owners of a steamboat for the destruction of said flat boat, caused by waves occasioned by said steamboat going too near thereto, under a full head of steam, and out of the usual channel.

IT IS NO DEFENSE TO ACTION FOR WASHING FLAT BOAT FROM ITS MOORINGS and causing its destruction, on the part of a steamboat out of the usual channel, and under a full head of steam, to say that if the flat boat had been tied to the shore in an ordinarily secure manner it would have escaped injury.

WHERE WRONGFUL ACT IMMEDIATELY CAUSING INJURY is the work and fault of one party alone, he shall be liable for it, although such damage be increased or entirely result through some previous neglect of the other party.

ERROR to the Jefferson circuit. The facts appear from the opinion.

Marshall and Sullivan, for the plaintiff.

Dunn and Hendricks, for the defendant.

By Court, PERKINS, J. Brown, the owner of a flat boat, brought an action against Wright and others, the owners, etc., of the steamboat Wisconsin, alleging that while his, said Brown's, flat boat was moored at the wharf in the city of Madison, on the Ohio river, laden with a cargo of, etc., of the value, etc., the defendants carelessly ran said steamboat past said flat boat, under a much greater head of steam than usual, and out of the ordinary channel, thereby producing waves of such violence and so near to said flat boat that it was forced from its moorings, thrown upon a post on the shore, broken, sunk, etc., to the damage, etc.

Plea, the general issue. Jury trial. Verdict and judgment for the plaintiff for two hundred and forty dollars and costs.

The evidence upon the record shows that Brown had a flat boat at the Madison wharf, laden with hollow stoneware; that said boat was moored with "one anchoring line, having an anchor attached, quartering up and out into the river from the bow, a head-line almost straight up the river, and a breast-line to the shore," and was in charge of one Montgomery; that said boat had been lying at the wharf for some days; that on the seventeenth of December, and while said flat boat was so lying at the Madison wharf, the steamboat Wisconsin, a new boat just finished at Madison, and lying at the wharf about one hundred yards below the flat boat, left said wharf to make her first trip, backed down some one hundred or two hundred yards, and then came up under a full head of steam, out of the customary channel for boats, and near the Indiana shore, in order, as the evidence is, "to show off," whereby the waves were produced which occasioned the destruction of the flat boat and cargo in question. It further appears that everything was done that

could be done, after the injury occurred, to save the flat boat and cargo.

The circuit judge, in his instructions to the jury, said: "I hold it to be the duty of the officers of steamboats, when arriving at, departing from, or passing by a landing at which flat boats are moored, to run and manage their boats with a due regard to the safety of the flat boats. They ought at such times to run their boats with less velocity than usual, and carefully avoid approaching or passing so near to the flat boats as to endanger their safety. On the other hand, flat boats ought not to be moored so near to the usual place of steamboat landing as to render it inconvenient for steamboats to get in or out without danger to the flat boats.

"If you are satisfied from the evidence that the officers of the *Wisconsin* were guilty of gross carelessness in running their boat with greater velocity and nearer the shore than was proper under the circumstances, and so caused the plaintiff's boat to sink; and are also satisfied that if they had run their boat with reasonable velocity, and at a proper distance from the shore, and with reasonable care, the plaintiff's boat would not have been injured; you ought to find for the plaintiff, whether his boat was fastened to the shore and managed with ordinary care and skill or not, for in such a state of circumstances the loss was occasioned by the improper manner of running the *Wisconsin*, and would not have occurred but for that, and is, therefore, wholly attributable to that cause."

To this instruction the defendant excepted.

We shall consider this case as one of collision between the vessels; for it must be the same thing in principle whether the steamboat ran upon the flat boat or forced some other object upon it to produce the injury; and we must consider the instruction in its application to the case in which it was given, as presented by the evidence, all of which is upon the record.

We have, then, in short, this state of facts: A flat boat is moored at the Madison wharf, perhaps not as securely as is customary (though the preponderance of evidence is that it was); the steamboat *Wisconsin* is lying at the same wharf, and had been so long and so near to the flat boat that she must be presumed to know the manner in which said boat was fastened to the shore. The steamboat voluntarily leaves the wharf, backs down to a point some three hundred yards below the flat boat, and then comes up, contrary to the usual custom of boats on the river, and wrongfully, under a full head of steam, out of the

regular channel, and near to the flat boat, producing a collision or waves by which said flat boat is destroyed, though all proper efforts are made, at the time, by the person in charge, to save it and to diminish the damage occasioned by the collision; and the question is, Can the owners of the steamboat say, in answer to a suit for damages, that if the flat boat had been tied to the shore in an ordinarily secure manner, it would have escaped injury? It seems to us that they can not.

By the maritime law, where a collision happens and both boats are in fault, the injured or the more injured boat recovers of the other an amount that will equalize the loss between them. At common law, however, the general principle is, that a party can not recover anything for an injury which his own fault directly contributes to produce: *Halderman v. Beckwith*, 4 McLean, 286; *Strout v. Foster*, 1 How. 89. But there is a class of cases establishing this doctrine, that where the wrongful act immediately causing the injury is the work and through the fault of one party alone, he shall be liable for it, even though the damage such act occasions may be increased or entirely result through some previous neglect of the other party in respect to the thing injured; and especially if the party committing such wrongful act knows, at the time, of the previous neglect of the opposite party. We notice a few of these cases. *Davies v. Mann*, 10 Mee. & W. 546, was this: The plaintiff turned his donkey, fettered, into the public highway, which was an illegal act. "The defendant's wagon, with a team of three horses, coming down a slight descent at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after." It was proved that the driver of the wagon was, at the time, some little distance behind the horses. It was held that the plaintiff was entitled to recover for the ass, notwithstanding his own wrongful act in turning it fettered into the highway. "Were this not so," said Parke, B., "a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

Brownell v. Flagler, 5 Hill, 282, was as follows: Flagler was passing with a flock of about twenty lambs, which he had sold to a drover. A lamb belonging to Brownell was in the highway, and joined the flock of Flagler, going with it to the yard of one Sherman, where the flock was left for the drover, who, the next day, took away the flock, Brownell's lamb being in it, to market. Flagler was held liable to pay Brownell for

his lamb, though he did not sell it to or receive anything from the drover for it. Bronson, J., in delivering the opinion of the court, said that there might "have been some slight degree of negligence on the part of the plaintiff in allowing his lamb to escape into the highway;" but still the defendant knowingly drove away the lamb, when he might have separated it from his flock, and that he was in fault for not doing it.

Inman v. Funk, 7 B. Mon. 538 [46 Am. Dec. 526], was a case of collision between two flat boats, at the wharf at Louisville. The defendant carelessly ran against the plaintiff's boat, doing serious damage. The defendant contended that he ought not to be liable for said damage, because the boat injured was a weak one, and that, had it been a boat of ordinary strength, the collision would not have injured it. Marshall, C. J., in delivering the opinion of the court, says: "The weakness of the plaintiff's boat, as it rendered it the more liable to injury from collision, called for greater precaution on the part of those who knew the fact. If the defendant did not know it, he was still bound to use the means proper to prevent collision, and if it occurred without the use of such means on his part, and without fault on the part of the plaintiff, the greater damage consequent upon the weakness of the boat must fall upon the defendant." So we say in this case, as to any increased damage resulting from the flat boat not being tied as firmly to the shore as it might have been. In the *New Haven Steamboat etc. Co. v. Vanderbilt*, 16 Conn. 420, a case of collision, where the defendant contended the plaintiff was in fault in not showing lights, the collision having occurred in the night, the court say: "While, on the one hand, a party shall not recover damages for an injury which he has brought upon himself, neither shall he be permitted to shield himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then, it would seem a party is bound to use common and ordinary caution to be in the right. Lord Ellenborough, in *Butterfield v. Forrester*, 11 East, 60, said: 'A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.'"

The judgment is affirmed, with three per cent damages and costs.

COLLISIONS: See note to *Broadwell v. Swigert*, 45 Am. Dec. 51, where the whole subject of collisions is treated at length.

MASTER OF VESSEL IN MOTION is bound to know that a vessel at anchor can not get out of his way, and to take measures accordingly: *Simpson v. Hand*, 36 Am. Dec. 231.

WHERE LOSS OCCURS FROM MUTUAL NEGLIGENCE, neither party can recover at common law: *Simpson v. Hand*, 36 Am. Dec. 231.

THE PRINCIPAL CASE IS CITED to the point that if the immediate cause of the loss complained of is the act of the defendant, she must be liable for it, unless other facts in the case exempt her, in *Wright v. Gaff*, 6 Ind. 421; *The Indianapolis & Cincinnati R. R. Co. v. Caldwell*, 9 Id. 399; *Williams v. New Albany & Salem R. R. Co.*, 5 Id. 114. See also *Pittsburgh, Ft. Wayne, & C. R. R. Co. v. Karns*, 13 Id. 87; *Ind. Cent. R. R. Co. v. Hudson*, 13 Id. 325; *Evansville & C. R. R. Co. v. Lowdermilk*, 15 Id. 120; *Lofton v. Vogels*, 17 Id. 105; *Neal v. Scott*, 25 Id. 448; *The Terre Haute R. R. Co. v. Graham*, 46 Id. 242.

STATE v. WILLIAMS.

[4 INDIANA, 234.]

INDICTMENT FOR RECEIVING USURIOUS INTEREST upon a note must state the place of the execution of said note.

RULE REQUIRES THAT WHEN COUNTY IS CLEARLY EXPRESSED in the body of an indictment, where any positive fact is averred, it should be stated to have been done "then and there," and this should be repeated to every material fact which is issuable and triable.

INDICTMENT for usury. The opinion states the facts.

Robinson and Gooding, for the state.

By Court, DAVISON, J. Indictment for usury. The indictment alleges that the grand jurors of the state, etc., impaneled, etc., to inquire for the body of the county of Crawford, etc., present that John Williams, late of said county, on the sixth of March, 1849, did receive of Martin Hoskins a note of hand executed by said Hoskins, whereby he promised to pay to the said Williams twenty-six dollars and forty cents one day after date; and that on the twenty-seventh of March, 1851, the said Williams did receive of said Hoskins, in payment of said note and the interest due thereon, in property and work and labor, the sum of thirty dollars and fifty cents; and therein, on the day and year last aforesaid, at and in the county aforesaid, did unlawfully and usuriously take and receive of said Hoskins, in property and work and labor, the sum of four dollars and ten cents, in payment of the interest due and owing, etc., by virtue of said note, that sum being more than six per cent per annum, to wit, eighty-four cents more than lawful interest, etc. The court, on the defendant's motion, quashed the indictment.

There is a fatal defect in this indictment. It does not allege

the place where the note was made. The rule is, "Where any positive fact is averred, it should be stated to have been done 'then and there,' after the county has been clearly expressed in the body of the indictment; and the allegation of time and place, 'then and there,' should be repeated to every material fact which is issuable and triable:" 1 Ch. Crim. L. 198.

It seems to us that the place where the note was made was a positive fact, issuable and triable, which the state was bound to show. Whether the sum taken as interest was or was not usurious, might depend on the *lex loci* where the contract was executed; and it follows that this indictment does not contain all the facts requisite to constitute the offense.

The motion to quash was therefore correctly sustained.

The judgment is affirmed with costs.

VENUE MUST BE LAID IN COUNTY WHEREIN OFFENSE WAS COMMITTED:
People v. Mather, 21 Am. Dec. 122.

BEPLEY v. STATE.

[4 INDIANA, 264.]

IT IS FOR JURY TO SAY WHETHER EVIDENCE that defendant on a single occasion sold liquor in less quantities than a gallon, and suffered it to be drank in his house, and that he had bottles of different kinds of liquor usual in retail establishments, is sufficient to sustain a prosecution under section 17, act of March, 1853; and their finding will not be disturbed.

DEFENDANT WHO MOVES FIRST IN ARREST OF JUDGMENT can not afterwards take the opinion of the court below on the sufficiency of the evidence by a motion for a new trial, unless he brings himself within one of the recognized exceptions.

ANY PRACTICE DEEMED INJURIOUS TO PUBLIC MAY BE DECLARED NUISANCE by the legislature, and punished as such.

COURTS HAVE NOTHING TO DO WITH POLICY, necessity, or expediency of a law. This is a matter for the consideration of the legislature.

APPEAL from the Hamilton common pleas. The opinion states the facts.

Garver, for the appellant.

Chipman, Robinson, Riley, Taylor, and Coburn, for the state.

By Court, STUART, J. This was a prosecution for a nuisance, under the seventeenth section of the act of March, 1853, regulating the retail of spirituous liquors. Trial by jury. Verdict and judgment for the state.

A motion to quash made before trial was correctly overruled. In form, the proceedings are similar to the case of *Lindville v. State*, 3 Ind. 580, decided at the November term, 1852; and for the reasons there given, are substantially good.

There was evidence tending to prove that Bepley on a single occasion sold liquors by a less quantity than a gallon, and suffered it to be drank in his house. It appeared also that he had bottles of different kinds of liquor usual in retail establishments. It was for the jury to say whether this evidence was sufficient. Having so decided in a matter peculiarly within their province to decide, we think the verdict ought not to be disturbed: *Armstrong v. State*, 4 Blackf. 247.

There is a technical point, well settled in the books, but often overlooked in practice, which would restrain us from disturbing the verdict, if we were otherwise so disposed. The defendant moved first in arrest of judgment. According to the authorities, he could not afterwards take the opinion of the court below on the sufficiency of the evidence, by a motion for a new trial, unless he had brought himself within some of the recognized exceptions, which he has not done. In the order in which they were made, the one motion was fatal to the other: *Rogers v. Maxwell*, 4 Ind. 243; *Mason v. Palmerton*, 2 Id. 117.

The constitutional question so elaborately argued by counsel does not arise in the record. The seventeenth section is not liable to any objection of that kind. It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly. This is fully recognized in the elaborate liquor cases decided in *Thurlow v. Commonwealth*, 5 How. 504, *et infra*.

Whether the law is politic or expedient or necessary, is not a question with which the courts have anything to do. That lies between the people and those to whom they delegate the temporary power of making laws. If the act is not a reflection of public sentiment, neither the responsibility nor the remedy lies with the courts.

No inference is to be drawn that the court considers the whole act constitutional. There is sufficient in the statute, independent of the parts which counsel deem unconstitutional, to execute the seventeenth section and support the judgment of the court below: *Clark v. Ellis*, 2 Blackf. 8; and this is all which the case at bar brings judicially before us.

The judgment is affirmed with costs.

EVIDENCE THAT DEFENDANT KEPT BAR WITH BOTTLES in it is admissible on the trial of an indictment against him for selling liquor without a license: *People v. Hulbut*, 47 Am. Dec. 244, and note.

"WITH THE WISDOM, SOUND POLICY, AND EXPEDIENCY OF A LAW the courts have nothing to do. These are matters purely of legislative deliberation and cognizance:" *Winter v. Jones*, 54 Am. Dec. 385.

THE PRINCIPAL CASE IS CITED to the point that a motion in arrest of judgment suspends a motion for a new trial, in *Smith v. Porter*, 5 Ind. 429; *Hord v. The Corporation of Noblesville*, 6 Id. 55; *Brown v. Clark*, Id. 466; *Chrisman v. Melne*, Id. 487; *Gillespie v. State*, 9 Id. 381. It is further cited to the point that the legislature have the power to declare what shall constitute a nuisance, in *Hackney v. State*, 8 Id. 497. See also *Beebe v. State*, 6 Id. 528, 536, 544; *Maize v. State*, 4 Id. 342, where the principal case is cited.

YOUNG v. THE STATE BANK.

[4 INDIANA, 301.]

AMENDMENT—JUDGMENT BY NIL DICT was entered against defendant, whose pleas had been filed, but not so entered by the clerk. The record was afterwards amended, without notice to plaintiff, so as to show that such pleas had been filed. *Held*, that such amendment was proper; that plaintiff should have taken advantage of his want of notice by application to have the amendment set aside; that in the absence thereof, the pleas should be considered part of the record; consequently the judgment by *nil dicit* was erroneous, and should be reversed.

LEGISLATURE HAS NO POWER BY SPECIAL ACT TO GRANT NEW TRIAL of a suit at law.

ASSUMPSIT. The opinion states the facts.

Hester and Wallace, for the plaintiffs.

Kinney and Gookins, for the defendant.

By Court, PERKINS, J. *Assumpsit* by the State Bank for the use of the branch at Terre Haute, against John Young and others, upon a promissory note payable at said branch. Judgment below for the plaintiff, September, 1841.

In 1845 the legislature of the state passed an act granting a new trial. The circuit court held said act unconstitutional, and refused to hear the new trial. Before considering this point, another will be noticed.

The judgment in the case upon the trial had been entered as one by *nil dicit*, no defense appearing to have been interposed. Subsequently the record was amended, on the motion of the defendants, in the absence of the plaintiff, so as to show that the plea of the general issue and several special pleas were filed, upon which issues at law were formed. It is objected that said

amendment was illegally made. This objection has already been answered. When this cause was before us upon the chancery side of the court, it was decided that the court below had power to make the amendment. See the case of *The State Bank v. Young*, 2 Ind. 171 [52 Am. Dec. 501]. It is there laid down, that "what the bill says as to the entry made in the record relative to the filing of the pleas is not material. The pleas were on file among the papers in the cause, but the clerk had omitted to make an entry of their being filed. The court of law surely could have that misprision amended at any time when proper application was made. If the amendment was objectionable for the want of notice to the bank of the motion, as is insisted upon by her counsel, she should have applied to the court of law, on that ground, to set the amendment aside."

No such application appears to have been made, and the pleas must, therefore, be considered a part of the record of the cause. This being the case, the judgment by *nil dicit*, those pleas being undisposed of, was clearly erroneous, and must, for this cause, be reversed: *Tipton v. Cummins*, 5 Blackf. 571; *Maddox v. Pulliam*, Id. 205.

We now return to the point passed by, though it has become immaterial in the case.

The circuit court did right in refusing to hear the new trial granted by the special act of the legislature. The legislature does not possess the power to grant a new trial in a suit at law. The constitution of Indiana has always contained the following provision: "The powers of the government of Indiana shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: those which are legislative to one, those which are executive to another, and those which are judiciary to another; and no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

There is no section of the constitution permitting the legislature to grant new trials. The granting of a new trial is a judicial act, and in this state controlled by settled rules of law. If an inferior court should, in any given case, exercise the power to grant new trials, in violation of these settled rules, this court would set aside the grant, and leave the judgment rendered unaffected.

Now, the constitution above quoted says the legislature shall not perform a judicial act. The granting of a new trial, we

have seen, is a judicial act. Therefore, the legislature can not grant a new trial.

And it is a power that should not be possessed by the legislature in its legislative capacity; because in that capacity it would not be governed by legal rules. In governments where the constitution converts the legislature, on some occasions and for some purposes, into a court, while that body is thus acting, it is governed by the same rules and restrained in its action by the same authorities as are courts of law. Not so where it acts simply in its legislative capacity; and to permit it to dispose of judicial questions in that capacity would be in the highest degree dangerous to the rights of the individual members of the community.

It has already been solemnly decided by the highest courts of the Union that the legislature of a state can not pass appraisement and stay laws that shall embarrass and postpone the collection of debts beyond the time allowed by the law of the contract, on the ground that such legislation impairs the obligation of contracts. But if the legislature may grant new trials *ad libitum*, it can forever prevent the collection of debts. It could, at pleasure, wipe out every judgment in the state. Possessed of such a power, that of passing stop-laws would not be sought for.

The judgment is reversed with costs. Cause remanded, etc.

AMENDING JUDGMENT, WHEN CAN BE DONE: See the following cases and notes: *Atkins v. Sawyer*, 11 Am. Dec. 188; *Bramlett v. Pickett*, 12 Id. 350; *Speed's Ex'r v. Hann*, 15 Id. 78; *Giles v. Pratt*, 26 Id. 170; *Smith v. Redus*, 44 Id. 429; *Mills v. Lumpkin*, Id. 677.

ACT OF LEGISLATURE AWARDED NEW TRIAL in an action which has been decided in a court of law is an exercise of judicial power, and operates retrospectively; it is therefore void: *Merrill v. Sherburne*, 8 Am. Dec. 52, and note.

THE PRINCIPAL CASE IS CITED in *Beebe v. State*, 6 Ind. 515, where the court say: "The question whether a law is in conflict with the constitution or not, and whether a thing is a nuisance or not, and hence liable to forfeiture, are judicial, and to be finally determined by the courts alone;" and again, at pages 528, 529, the principal case is cited, and the question of constitutionality of acts discussed. See also *Herman v. State*, 8 Ind. 552. It is cited in *The Brookville & G. Tp. Co. v. McCarty*, Id. 395, to the point that if the record is submitted to the supreme court as made up in the court below, no motion which the opposite party might have resisted having been made to strike out anything objectionable therein, such motion when made in the supreme court comes too late. It is further cited in *Baker v. Chambers*, 18 Ind. 222, where the court decide that clerical errors, or omissions in a justice's transcript, should be allowed to be corrected by the justice, especially when there are sufficient papers on file for him to correct or amend by.

COX v. O'RILEY.

[4 INDIANA, 303.]

WHARFINGERS AND WAREHOUSEMEN, UNLIKE COMMON CARRIERS, are responsible for the loss of goods intrusted to their care, only where such loss occurred through the neglect to exercise reasonable and ordinary care and diligence.

IN ACTION AGAINST WHARFINGER FOR VALUE OF GOODS received by him, and which he failed to deliver to the consignee, he must prove the property to have been lost, or to have passed out of his possession, in order to have the court determine whether it had been so lost for the want of reasonable care.

REQUESTING "A LAD," WHO DOES NOT APPEAR TO BE AGENT OF CONSIGNEE, to notify said consignee that a box was at the wharf for him, or proof that a rumor of such fact had reached said consignee, will not excuse a wharfinger from his neglect to give direct and reasonably prompt notice thereof.

USAGE MAY BE PROVED TO AID IN CONSTRUING CONTRACT, or to show the manner of discharging some duty or performing some act. But the usage must relate to matters of fact, and not to modes of thinking. It must also be shown to be long continued, uniform, and generally known.

USAGE IN CONFLICT WITH PLAIN, WELL-ESTABLISHED RULES OF LAW has no validity.

ASSUMPSIT. The opinion states the facts.

Baker, for the plaintiffs.

Jones and Blythe, for the defendants.

By Court, PERKINS, J. *Assumpsit* by the plaintiffs against the defendants for the purpose of recovering from the latter the value of a box of goods which it is alleged they received as wharfingers and negligently lost. Plea, *non assumpsit*. Trial by the court without a jury, and judgment for the defendants. A motion for a new trial was overruled.

The evidence is upon the record; and from it it appears that in March, 1851, the plaintiffs, Cox, Robb & Co., purchased of a mercantile house in Cincinnati, Ohio, a bill of goods exceeding eight hundred dollars in amount, which goods were to be forwarded to the store of said Cox, Robb & Co., at Paris, in Posey county, Indiana.

The goods were packed in four boxes, and shipped on the third day of April, 1851, upon the steamboat Bay State, and consigned to Cox, Robb & Co., Paris, care of Morgan & Keen, Evansville, Indiana. Paris is situated some twenty-five miles from Evansville, in a north-westerly direction, and back from the river.

Morgan & Keen were wholesale merchants in Evansville, and the plaintiffs, Cox, Robb & Co., were customers of them, and hence took the liberty, without their consent or knowledge, of having the goods in question consigned to their care.

The defendants, O'Riley & Mitchell, were wharfingers and forwarding and commission merchants at Evansville, and in the habit of receiving goods shipped to Morgan & Keen.

Three boxes of said goods arrived at Evansville, were discharged upon the wharf-boat of Taylor & Harvey, and received by O'Riley & Mitchell, the defendants, who, on the twenty-first of April, by their clerk, Mr. Wheeler, presented the bill of lading of the four boxes named in it as having been shipped, at the store of said Morgan & Keen, and received from them the charges on said boxes for freight. Morgan & Keen did not have the goods removed from the boat, but suffered them to remain upon it till the next day, when the teams of Cox, Robb & Co. arrived and received the three boxes for transportation to Paris, the fourth box being still missing.

Two or three days after this the missing box was discharged upon the wharf-boat of Taylor & Harvey, being returned from Paducah, whither, by some agency, it had been taken. It was received by the defendants, O'Riley & Mitchell. Shortly afterwards it was missed again, and was unheard of for two weeks, at the end of which period it reappeared at Evansville, from a trip upon the Wabash, and was placed upon the wharf-boat of the defendants. The clerk of said wharf-boat, soon after, informed "a lad" employed about the store of Morgan & Keen, but in what capacity does not appear, though it was proved that it was not his business to receive or deliver goods, that the missing box had arrived, and requested him to notify his employers of the fact; but he did not know whether the request was complied with. The box remained on the outer guard of the wharf-boat for five days. Morgan & Keen, within a day or two after its arrival, had information that the box was upon said boat, but from what source the information was derived is not shown. On one occasion O'Riley directed a drayman to take said box to Morgan & Keen, and he promised to do so after he should have attended to a steamboat that was about landing at some point not designated in the port of Evansville. When he returned for the box he was unable to find it. It does not appear that he made any inquiry, but simply a search by himself for the box, which proved fruitless. The record discloses nothing further as to what became of it.

It was proved "that the practice on the wharf-boat of the defendants was, that 'town' freight was received by the defendants, but not stored on the wharf-boat unless especially directed by the owner or consignee, in which case regular commissions at one dollar per ton were charged; that defendants advanced the freight on town freight, for which advances, and for the trouble of receiving the freight, defendants charged commissions, but nothing was charged for storage, the owners or consignees being advised immediately of the receipt of their freight at the wharf; and that after such notification defendants did not consider themselves liable for the safety of freight; but frequently they notified the drayman of the owner or consignee of the arrival of the goods, and that the above mode as to town freight was the custom with the other forwarding and receiving merchants on the wharf; that in rainy weather town freight received by the defendants usually remained on the boat until the owner or consignee was informed of its arrival, but when the wharf-boat was filled with other freight, or the weather was good, town freight did not remain on the wharf-boat, but was rolled through it to the wharf, where it remained till removed by the owners; and that it was the custom of all the receiving merchants on the wharf not to send up the town freight by drays or otherwise, but to notify the owners of its arrival. That by town freight was meant such freight as was owned by or consigned to citizens of Evansville." Such is the case made by the evidence.

Wharfingers are not, like common carriers, answerable for all goods that may be intrusted to them in their line of business, except such as may be lost by the act of God or the public enemy. They are responsible for losses only which happen through a neglect to exercise reasonable and ordinary care and diligence. They are in the same category, in this particular, with warehousemen: *Story on Bail.* 451; *Thomas v. Boston and Providence R. R. Co.*, 10 Met. 472 [43 Am. Dec. 444]. Were it shown, then, by the evidence, that the box of goods in question, which is traced to the possession of the defendants as wharfingers, had actually passed out of their possession—been lost, in fact, from them—we should be called upon to determine whether it had been so lost for the want of reasonable care on their part or not.

But the evidence does not show that it has passed from the possession of the defendants. It was last seen upon their wharf-boat, and they give no further account of it. For aught that appears, it may have been taken by them to their own house and

appropriated to their own use. It devolved upon them to show the box out of their possession. They might have proved that it had been consumed by fire, crushed and destroyed by other boxes, etc., thrown upon it, knocked into the river, or taken off by the hands of some other steamboat, etc.; and when such proof had been made, it would have devolved upon the plaintiffs to establish that the loss, however it might have happened, occurred for the want of reasonable care on the part of the defendants. But they must first clear themselves of the possession of the property. A rule of law that would permit a party to receive property, refuse to account for it, and be protected in the refusal by a presumption that it was lost would work too great and too frequent injustice to be tolerated. In the case before us, one of the defendants points out the box in controversy to a drayman. It is then on his own boat, in his own custody. At a subsequent hour the drayman calls to receive the box, but it is missing. No attempt is now made by the defendants to account for its absence. It is not shown that any other steamboat had been receiving, in the mean time, goods from the wharf-boat on which the box was seen, and hence might have taken it, nor that any person had been upon the wharf-boat for any purpose. The naked facts simply appear that the box is at one hour in the possession of the defendants, at another it is called for and not found, and from that time to the present remains unaccounted for. The rule that the party must prove the property to have been lost may sometimes operate hardly on the bailee, but not so often as would the contrary work injustice to the owner.

But it is said that usage at Evansville absolves wharfingers from liability for goods lost after notice to the consignee or owner, and that the defendants are brought by the evidence within the usage. If there be such a usage at Evansville, it can not bear upon this suit, for it is not shown that after the return of the missing box from the Wabash any notice was given to the consignees. The clerk of the wharf-boat requested a lad in their employ to notify them. Without further information about this lad, we can not say he was an agent of the consignees to whom notice, binding on them, could be given; and the clerk of the wharf-boat did not so regard him, for he did not assume to give the notice to him as agent, but requested him rather as agent of the clerk to give the notice to Morgan & Keen. With this request there is no evidence that he complied. True, Morgan & Keen had information, by rumor or otherwise, that the

box was at the wharf-boat; but they were not bound to act upon rumor, and the defendants can not avail themselves of any such irregular, informal notice in excuse for their own neglect to give direct and reasonably prompt notice.

But no such usage as is contended for is proved. A usage of trade may be proved to aid, in a case of doubt, in construing a contract, or determining upon the manner of discharging some duty or performing some act; but to give it controlling effect, it must be shown to be a long-continued, uniform, and generally known usage. It must also be a usage relating to matters of fact, and not to modes of thinking as to the law. In this case the proof is simply that the wharfingers, etc., at Evansville, after notice given, etc., were accustomed to consider themselves as not responsible. This amounts to nothing. A usage in conflict with plain, well-established rules of law is not admissible in evidence in any case, and must be disregarded. We may be permitted to add the remark that were the courts, by their decisions, to encourage the growth of these local usages, originating generally in lax business practice or mistaken ideas of law, they might become as great an evil, a source of as much want of uniformity in the law, as was the local legislation of the past—an evil supposed to be eradicated from our political system by the new constitution.

For cases illustrating the law as to proving usage and custom to aid in the construction of contracts, etc., see *Foye v. Leighton*, 22 N. H. 71 [53 Am. Dec. 231]; *Edie v. East India Co.*, 2 Burr. 1216; *Bowen v. Stoddard*, 10 Met. 375; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137; *Beirne v. Dord*, 2 Id. 89; *Beals v. Terry*, Id. 127; *Suydam v. Clark*, Id. 133; *Webb v. National F. Ins. Co.*, Id. 497; *Read v. Gibbs*, 3 Id. 203; *Child v. Sun Mut. Ins. Co.*, Id. 26; *Hawes v. Lawrence*, Id. 193; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, and cases there cited; and see 2 Greenl. Ev. 205.

The judgment is reversed with costs. Cause remanded, etc.

COMMON CARRIERS AND WAREHOUSEMEN, RESPECTIVE LIABILITIES OF.—Common carrier is liable for all losses of goods intrusted to his care, except where such loss occurs through "the act of God," or the "public enemy:" 1 Parsons on Cont. 635; but warehousemen (Id. 618) and wharfingers (Id. 622) are held only to ordinary care and diligence. The entire subject of the liability of warehousemen for the loss of goods intrusted to their care is treated of in the note to *Schmidt v. Blood*, 24 Am. Dec. 143.

ONUS OF SHOWING NEGLIGENCE IS ON PLAINTIFF in an action against a warehouseman for goods intrusted to him, unless there is a total default on his part in delivering or accounting for the goods: *Schmidt v. Blood*, 24 Am. Dec. 143, and note 150.

USAGE CONTRARY TO COMMON LAW IS OF NO EFFECT: *Harris v. Carson*, 30 Am. Dec. 510; see also *Atwood v. Reliance Trans. Co.*, 34 Id. 503.

EVIDENCE OF USAGE OR CUSTOM IS ADMISSIBLE for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference thereto: *Sampson v. Gazzam*, 30 Am. Dec. 578; see also *Barber v. Brace*, 8 Id. 149; *Thompson v. Hamilton*, 23 Id. 619; *Avery v. Stewart*, 7 Id. 240; *Kendall v. Russell*, 30 Id. 696.

THE PRINCIPAL CASE IS CITED by the court in *Harper v. Pound*, 10 Ind. 36, and *Adams v. Waggoner*, 33 Id. 530, while discussing the character of a usage or custom which would be admitted in evidence. See also *Pribble v. Kent*, 10 Id. 328. It is also cited in *Union R. R. etc. v. Yeager*, 34 Id. 9, where the court say "certainty is one of the requisites of a good custom." See further, as to usage, *Spears v. Ward*, 48 Id. 546; and *Shigley v. Snyder*, 45 Id. 540, both citing the principal case.

UNKNOWN HEIRS v. KIMBALL.

[4 INDIANA, 546.]

EQUITABLE LIEN.—IF DEBTOR BE LIVING, CREDITOR ACQUIRES BY JUDGMENT a lien upon all the real estate to which such debtor has the legal title, and by judgment and execution he acquires a like lien upon all the personal property of such debtor. If such debtor has equitable title to either real or personal property, equity, in aid of the law, carries along the lien and enforces it against such property. But either the judgment, or judgment and execution, must first have been obtained, in order to create the lien.

WHERE ORIGINAL DEBTOR IS DEAD.—The law is well settled in Indiana that a judgment, even at law, need not be obtained before going into chancery for the collection of the debt. The ground of this jurisdiction stated.

WHERE CHANCERY HAS JURISDICTION, independent of all circumstances, and in the first instance for the collection of a debt, the question of solvency or insolvency could have no influence with the court in the determination of the cause.

WHERE BILL IS FILED BY ONE CREDITOR, or a few in behalf of all, all are allowed to come in under the decree, prove their claims, and have them paid in the course of administration.

BILL FILED TO SUBJECT EQUITABLE ESTATE OF DECEASED DEBTOR to the payment of a judgment should make the executor or administrator of said deceased a party, or if none had been appointed, it should so allege.

BILL FILED AGAINST UNKNOWN HEIRS should contain an affidavit that such heirs are unknown, as required by statute.

BILL in chancery. The opinion states the facts.

Brackenridge, for the plaintiffs.

Howe, for the defendants.

By Court, PERKINS, J. Warren Kimball, in behalf of himself and other creditors, filed a bill in chancery in the Lagrange circuit court, setting forth that Horace Thatcher and Michael T. Whitney were indebted to him in Ohio, by promissory note, in the sum of four hundred dollars; that about one year after the execution of said note, to wit, in 1838, said Whitney departed this life; that in January, 1839, judgment was obtained on the note in Ohio, against the other joint maker, a man destitute of all property, and who, in 1842, procured his discharge in the United States district court of Ohio as a bankrupt; that Whitney, deceased, left no property except a tract of land particularly described, lying in Lagrange county, Indiana; that he left heirs whose names were unknown. He prayed a decree for the sale of the land, etc.

No affidavit was annexed to the bill, nor did it allege that the heirs were non-residents, nor that no administrator had been appointed on Whitney's estate.

Notice by publication in a newspaper, on a return of "not found" by the sheriff, was given of the pendency of the suit. Default by the defendants. Creditors other than the plaintiff Kimball were permitted to come in and prove their claims. Sale of the land decreed, etc.

To this decree it is objected—

1. That the creditors had not obtained judgments upon their claims before attempting to enforce their collection by this proceeding.

Where the debtor is not dead, and possesses an equitable interest in real estate, inasmuch as by law the creditor acquires by judgment a lien on real estate in which such debtor has the legal interest, equity, in aid of the law, carries along the lien, and enforces it against real estate in which the debtor has only such equitable interest. And as by law the creditor acquires, by judgment and execution, a lien on the personal property to which the debtor has the legal title, equity enforces such lien on the equitable interest of the debtor in personal property. But it does this only where a judgment, which constitutes the lien at law in the one case, and a judgment and execution in the other, have been obtained.

Where, however, the original debtor is dead the law is settled, in this state, that a judgment, even at law, need not be obtained before going into chancery for the collection of the debt. In *Martin v. Densford*, 3 Blackf. 295, the court say: "It is true that it is a well-settled general principle that a party can not

apply to a court of equity, if he have a full and complete remedy at common law. To this general and salutary principle there are, however, a few exceptions, one of which is, where the debtor is dead, and the creditor has to proceed against his heirs, executors, or administrators. In such cases, courts of equity have concurrent jurisdiction with courts of law; and the creditor may elect into which court he will go." See also *Sweny v. Ferguson*, 2 Id. 129; *O'Brien v. Coulter*, Id. 421; *Kipper v. Glancey*, Id. 856; *Bryer v. Chase*, 8 Id. 508.

This jurisdiction rests on the ground that executors, administrators, and heirs are or may be trustees for creditors, and hence are liable to be called to account in chancery. And if, in a given case, a remedy exists at law also, the two jurisdictions are in such case concurrent.

2. The second objection is, that Whitney's insolvency was not proved. There is nothing in this objection. Chancery having, as we have seen, jurisdiction in the first instance, and independent of all accidental circumstances, for the collection of the debt, the question of solvency or insolvency could have no influence with the court in the determination of the cause.

3. It is objected that creditors other than the plaintiff in the bill were permitted to come in and prove their claims. But this bill was filed by the plaintiff expressly in behalf of himself and all other creditors. He did not, even if he could have done so (a point on which it is not necessary for us now to say anything), claim any preference over other creditors in the payment of his demand. And where a bill is filed by one or a few in behalf of all the creditors, all are allowed to come in under the decree, prove their claims, and have them paid in the course of administration: *Story's Eq. Pl.* 125; *Barton v. Bryant*, 2 Ind. 189; *McNaughton v. Lamb*, Id. 642.

4. There was no allegation in the bill that an administrator had not been appointed on Whitney's estate. This is a good objection. The bill should have made the administrator or executor, if either existed, a party; and if neither existed, it should have alleged the fact in excuse. The reason is, the personal estate which the executor or administrator represents is the primary fund out of which debts should be paid.

5. The point is also made that there is no affidavit to the bill, or in the case, that the names of Whitney's heirs were unknown; and it presents a radical defect in the proceedings. The statute of 1852, which is a transcript of that of 1843 upon this subject (see R. S. of that year, p. 833), enacts that the plaintiff "shall

annex to his complaint an affidavit of his want of knowledge of their names, and that their residence is, as he verily believes, not in this state:" 2 R. S. 36.

This statute must be substantially complied with.

The decree is reversed with costs. Cause remanded, etc.

WHEN CREDITOR MUST HAVE JUDGMENT AND EXECUTION UNSATISFIED in order to maintain a bill to reach equitable assets of debtor: See *Miller v. Davidson*, 44 Am. Dec. 715, and note 722, collecting prior cases in this series.

CREDITOR MAY FILE BILL IN HIS OWN NAME, or on behalf of himself and all other creditors in a like situation who may choose to come in under the decree: *Edmeston v. Lyde*, 19 Am. Dec. 454. In *Kenton v. Robbins*, 7 Ind. 106; *Williams v. Reynolds*, Id. 624; and *Scott v. The Indianapolis W. W.*, 48 Id. 78, the principal case is cited and commented upon. It is also cited in *Johnson v. Petterson*, 12 Id. 471, to the point that the petition in such cases should show that the heirs were non-residents before they could be proceeded against as such.

THIS CASE OF *Unknown Heirs v. Kimball*, after having been reversed, as is seen from the opinion above, came up in the supreme court again: See *Kimball v. Whitney*, 15 Ind. 280.

BROWN v. BROWN.

[4 INDIANA, 627.]

FOR FILING UNNECESSARILY GROSS AND INDELICATE PETITION FOR DIVORCE, the court taxed the costs upon plaintiff's attorney: *held*, that the court had a right to exercise such power in its discretion, and that the appellate court can only interfere in case of an abuse thereof.

PETITION for divorce. The opinion states the necessary facts.

Kiger, for the plaintiff.

Baker, for the defendant.

By Court, ROACHE, J. Petition for a divorce. On the hearing of the petition it was dismissed. The court taxed the costs of the cause against the attorney of the plaintiff, because of the unnecessary grossness and indelicacy of the petition, and of his improper deportment in reading it. To set aside this taxation, the cause is brought here.

To protect itself against gross violations of decency and decorum is a necessary incidental power of a court. They have the right to punish in this way such misconduct as is alleged in this case on the part of an attorney. It is a power to be exercised at the sound discretion of the judge, and this court can interfere only where it is shown to have abused its discretion.

This is not shown in the present case: See *Loveland v. Jones*, 4 Ind. 184.

The judgment is affirmed with costs.

In *Ex parte Smith*, 28 Ind. 49, the court cite the principal case to sustain the proposition that, independent of statutory provisions, it is an inherent, necessary, and incidental power of a court to protect itself, its authority and dignity, against insult and gross violations of decency and decorum, by the infliction of summary punishment by fine and imprisonment, or either, upon those guilty of such contempt. It is also cited to the same point in *Redman v. State*, 28 Id. 212.

LEACH v. LEACH.

[4 INDIANA, 628.]

WHERE FATHER EXECUTES DEED OF FARM TO HIS SON, UPON CONSIDERATION of one dollar and of the son's executing a bond to him covenanting to cultivate said farm in a husband-like manner and to deliver to his father one third of the yearly produce of said farm, the deed and bond are to be treated as together constituting a single instrument, and are but parts of one contract.

WHERE CONSIDERATION OF DEED WAS ONE DOLLAR, and the execution of an agreement by the grantee to pay to the grantor, during his life, one third of the crop raised on the demised premises, the performance of this latter agreement is a condition subsequent, and the failure to so pay the one third yearly produce is such a breach as will work a forfeiture of the estate, and equity will interfere to set aside the conveyance.

UPON SETTING ASIDE CONVEYANCE, COURT SHOULD TAKE ACCOUNT. The defendant should be allowed for the money consideration paid by him, together with interest, for rents paid, and improvements made, and should be charged with the rent for the whole farm from the time he went into possession.

ERROR to the Floyd circuit. The opinion states the facts.

Crawford, for the plaintiff.

Collins, for the defendant.

By Court, ROACHE, J. Bill in chancery by John S. Leach against Jacob B. Leach.

In 1834 the plaintiff and his wife conveyed to the defendant, his son, the farm on which the former resided, for the nominal consideration of one dollar. Contemporaneously with the execution of the deed, the son executed a bond to the father, in which, after reciting the conveyance, in consideration thereof, among other stipulations, he bound himself to cultivate the farm in a husband-like manner, and to deliver to the grantor during

his life the one third of the produce, that is to say, one third of the grain, potatoes, etc.

The plaintiff filed the bill, alleging the defendant had violated the condition subsequent on which he held the title, by failing for years to deliver the one third of the produce of the farm, and praying that the deed might be canceled and an account taken. The defendant answered, admitting the execution of the bond to have been the principal consideration for the conveyance, but asserts there was a small pecuniary consideration which he paid, and denies that he had failed to deliver the stipulated amount of produce.

A good deal of evidence was introduced on both sides, and on the hearing the circuit court dismissed the bill.

The deed and the bond are but parts of one contract, and are to be treated as together constituting a single instrument: *Fellows v. Kress*, 5 Blackf. 536; *Sewall v. Henry*, 9 Ala. 24; *Walkins v. Gregory*, 6 Blackf. 113.

The defendant held the land upon a condition subsequent, that he would in all things substantially comply with his covenant. In such case, a failure to perform the obligation is a breach of the condition subsequent and a forfeiture of the estate, and forms a proper subject for the interference of a court of chancery: *Jenkins v. Jenkins*, 3 T. B. Mon. 327; *Scott v. Scott*, 3 B. Mon. 2; *Devereux v. Cooper*, 11 Vt. 103; *Hefner v. Yount*, 8 Blackf. 455.

Upon a careful review of the evidence, we have come to the conclusion that it is clearly established that the defendant has not substantially performed the obligation of his bond. The payment of the small pecuniary consideration was not sufficient. Manifestly, the leading consideration which moved the father to make the conveyance was to secure to himself and his wife a support in their declining years. The contract was highly advantageous to the son. For a very disproportionately small sum in money, and a payment for the few remaining years of the father's life of the same rent he would have had to pay to any one else for the use of land, he became the owner in fee of the farm. Even this pittance he failed to pay, and besides, denies to his father the use of the dwelling on the farm in which he had lived, because it was not specifically mentioned in the bond.

The undertaking to pay the rents was the leading consideration of the deed, and without which it is evident it would not have been made. The failure to comply with that obligation worked a forfeiture of his estate.

Upon setting aside the conveyance it was proper to take an account. The defendant should be allowed for the money consideration, so far as he could prove he had paid it, with interest; for the improvements made, and all rents paid; and should be charged with the rents of the whole farm, including that portion by him cleared, from the time he went into possession of it. This is the proper and only mode of restoring the parties to their original situation.

The decree is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

WHERE DEED IS MADE BY FATHER TO HIS SON, in consideration of a covenant on the part of the son to maintain the grantor and pay his debts, on condition that if he fails to do so the grantor shall have a right of re-entry, if the son refuses to pay one of such debts, after it has been established by a board of arbitrators, it is a breach of the covenant, and may work a forfeiture of the estate: *Jackson v. Topping*, 19 Am. Dec. 515. This subject is treated of at great length in note to *Cross v. Carson*, 44 Id. 742.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in *Leach v. Leach*, 10 Ind. 272; *Thompson v. Thompson*, 19 Id. 330; and *Leedy v. Crumbaker*, 13 Id. 523. It is also cited to the point that if an indorsement of a note and the execution of an assignment were concurrent acts, they are to be construed together as constituting but one contract, in *Collier v. Mahan*, 21 Id. 111; see also *Thompson v. Allen*, 12 Id. 542.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

EMMERSON v. CLAYWELL.

[14 B. MONROE, 18.]

ASSIGNOR OF BOND, EITHER FOR MONEY OR LAND, undertakes, by implication, that he has a right to pass to the assignee what his assignment purports to pass. If the assignor does not possess such right, he is liable for a breach of his implied undertaking the moment the assignment is made.

ASSIGNEE OF BOND, THOUGH RECEIVING IT WITH KNOWLEDGE THAT ANOTHER PERSON CLAIMED IT, may recover against his assignor, unless by the contract he agreed to risk the claim of such third person.

VERDICT WILL NOT BE SET ASIDE WHEN AUTHORIZED BY EVIDENCE.

PARTIES MAKING JOINT ASSIGNMENT CAN BE SUED JOINTLY, and a joint judgment rendered in the case will not be error unless there was a motion that separate judgments be rendered.

APPEAL from Cumberland circuit. The facts are stated in the opinion.

B. and J. Monroe, for the plaintiff.

Harlan, Bell, and Craddock, for the defendants.

By Court, CRENSHAW, J. The decisions referred to by the counsel of the appellants are based upon states of cases different from that disclosed in the present controversy. In all the cases referred to by the counsel, it appears that the assignors of the title bonds had an absolute right to the bonds, and a right to demand a conveyance or compensation in damages from the obligors therein; and the responsibility of assignors in such cases depends upon different principles, and the measure of recovery is governed by different criteria.

The title bond in this case has been executed to King, and assigned by him to Free Billy, a man of color, as indemnity for a debt owing to him by King, and was therefore subject to be reclaimed and redeemed by King. Free Billy's right to it and the land it called for was not absolute, but contingent, and all the subsequent assignees with notice took it subject to the equities of the original assignor, King. King applied to the chancellor, and by his decree it was determined that he was entitled to the land for which the bond called. It is made to appear, therefore, that what the assignment to Claywell purported to pass to him, to wit, an indefeasible right to have from the obligors in the title bond a conveyance of the land, or compensation in damages, in his own right, for a failure to convey, did not pass to him.

We understand the doctrine to be, that an assignor of a bond, either for money or land, undertakes, by implication, that he has a right to pass to the assignee what his assignment purports to pass.

If an absolute and unconditional assignment be made of a bond either for money or land, the assignor, where there is no express stipulation to that effect, undertakes, by implication, that he is the absolute and unconditional owner of the bond, and has an indefeasible right to demand what the bond calls for; and if he has not such right, there is a breach of this implied undertaking the moment the bond is assigned; and it is not necessary that this want of right in the assignor should be established by suit. If it be as evident without a suit as with it, that a suit would be utterly unavailing, it is not necessary to prosecute it: *Roberts v. Atwood & Co.*, 8 B. Mon. 210. It is made manifest by the suit of *King v. Claywell, etc.*, that had Claywell sued the obligors in the the title bond, and obtained a conveyance, or damages for a failure to convey, it would have availed him nothing, as he would have held subject to the equity of King. We think, therefore, that unless it had been shown that Claywell agreed to take the assignment of the defendants, risking the claim of King, he has shown a right to recover, notwithstanding he may have known that such a claim existed. The undertaking of the defendants, by virtue of the assignment, is sufficiently comprehensive to impose a responsibility against such claim, and unless Claywell agreed to waive such responsibility, his right to recover is, we think, indisputably established.

Whether he did, in fact, waive this responsibility and agree to risk the claim of King, was submitted to the consideration

of the jury in the instruction given, and they were of opinion there was no such risking bargain, and the testimony does not authorize the court to say that the jury were not authorized to come to such conclusion.

The objection taken, that, inasmuch as Emmerson and Hereford appear by the assignments to them to have had rights to different quantities of land, a joint suit can not be maintained, can not avail. They made a joint assignment, and their undertaking was therefore joint, and a suit against them jointly was proper. It may be, that under the code separate judgments might have been entered, but there was no motion to this effect, and it was not error to render a joint judgment.

Wherefore the judgment is affirmed.

ASSIGNMENT—IMPLIED WARRANTY—LIABILITY OF ASSIGNOR.—One who for value transfers a negotiable note without indorsement thereby guarantees the genuineness of the instrument: *Lyons v. Miller*, 52 Am. Dec. 129; *Matthews v. Chrisman*, 51 Id. 124; *Thrall v. Newell*, 47 Id. 682, and notes. The principal case was affirmed in *Winstell v. Hehl*, 6 Bush, 62, to the effect that "the assignor has a right to pass to the assignee what his assignment purports to pass; or in other words, that he is the absolute and unconditional owner of the land, and has a right to demand what it calls for, and that he will respond for the sufficiency of the obligor or his representatives." It was cited *arguendo* in *Hurst v. Chambers*, 12 Id. 155. The latter case was an action instituted to recover an amount due on a promissory note. The court in passing upon the same held that the assignor of a note for value impliedly warrants that it is a valid instrument, and undertakes that it can be enforced against the parties whose names are signed to it.

VERDICT WILL BE SET ASIDE, WHEN: See *Lee v. Ashbrook*, 55 Am. Dec. 110; *Knowles v. Dow*, Id. 163; *Swamcot Machine Co. v. Walker*, Id. 172; *Edgerly v. Emerson*, Id. 207; *Hillebrant v. Brewer*, Id. 757, and cases cited in the notes.

LOUISVILLE AND FRANKFORT R. R. Co. v. MILTON.

[14 B. MONROE, 75.]

GRANTOR OF RIGHT OF WAY TO RAILROAD COMPANY through his property is not bound to fence the same, nor is the company under legal obligation to do so.

GRANTOR OF RIGHT OF WAY TO RAILROAD COMPANY who permits his stock to run upon the road does so at his own risk, unless he retains the right to continue the use of that portion of the property as a pasture.

RAILROAD COMPANY ARE NOT LIABLE FOR INJURIES DONE TO LIVE-STOCK straying upon the road unless the injury could have been avoided by its agents, with due regard to the safety of the train and its contents.

NO RIGHT OF ACTION ACCRUES AGAINST RAILROAD COMPANY WHEN STOCK RUNNING AT LARGE upon railroad are accidentally killed by train running at customary rate of speed.

APPEAL from Oldham circuit. The facts are stated in the opinion.

Morehead and Brown, for the appellants.

Rodman, for the appellees.

By Court, HISE, C. J. Robert Milton, plaintiff, sued the Louisville and Franklin railroad company, and presented in his petition, in separate paragraphs, as the grounds of his action, that the company, by their agents, had destroyed at different times, first, a brown mare; secondly, a sorrel horse; and thirdly, a cow and some hogs, all the property of the plaintiff, and in his possession. That they were destroyed while they were feeding within or upon the field or pasture of the plaintiff, in and through which the railroad of the company was situate and passed, and when they were upon or near the railroad; that the animals were destroyed by the locomotive and cars of the company having been run upon or over them while they were near or upon that part of the road which passed through the plaintiff's field or pasture, through the negligence and carelessness of the company's engineers, agents, and conductors, in not giving the animals time to get out of way, in not driving them off from the road, and by reason of their negligent and improper manner of running the said locomotive and cars upon them.

The company answer and rely for their defense upon the ground that the plaintiff had granted to the company the right of way through the said field and pasture, and the right to construct their railroad through and upon it, and exhibit the grant; that the railroad was the exclusive property of the company, and they had an exclusive and lawful right to use the same by running upon it their locomotive and cars; and they deny that the destruction of the plaintiff's mare, horse, and cow was caused by the negligence, unskillfulness, or improper conduct of their agents, in running their trains upon their railroad, but insist that the animals belonging to plaintiff were destroyed, if at all, by the fault and negligence of the plaintiff, by permitting them to run at large upon the field through which their railroad passed, with the consent of the plaintiff himself, when there was no intervening fence to prevent them from trespassing upon the defendants' road, and hindering and obstructing defendants in the use of the road, and causing thereby great delays and damages to the passengers and property conveyed upon it.

So it appears that the plaintiff bases his right to a recovery

in the case upon the charge of the carelessness and negligence of the company's agents. The defendants deny that the injuries complained of were caused by the negligence, carelessness, or want of skill of the agents employed to run and conduct the trains upon the road, but rather by the improper conduct and negligence of the plaintiff, in permitting his stock to roam at large and to stray upon the railroad.

The jury, after having heard the evidence, and after having been instructed upon the law applicable to the case by the court, returned their verdict in favor of the plaintiff for twelve dollars in damages; whereupon the court gave judgment for the damages and costs of suit.

The defendants demanded that the verdict and judgment should be set aside, and new trial awarded, because—1. The verdict of the jury was not supported by the proof, and unauthorized by law; 2. Because the court misdirected the jury in respect to the law of the case.

From the amount of the damages found by the verdict, and from the proof in the cause, it is inferred that the jury regarded the company as only responsible for the value of the cow, and that with respect to the other animals, to wit, the mare, the horse, and the hogs, that the proof did not justify a verdict for their value against the company.

John W. Byers was the only witness who proved that the cow was destroyed by the locomotive and train of the company. He proves, in substance, that the locomotive and train ran upon and destroyed the plaintiff's cow on that part of the track where it passes through the plaintiff's pasture. That when he first saw the cow she was trotting along on the track about one hundred yards in advance of the train, which was running at its usual speed. That when the train first came in view, he heard the sound of the whistle, and continued to hear it sounding until the train struck and killed the cow. The witness did not perceive that any effort was made to stop the train.

Upon this state of pleadings and proof, the circuit judge overruled the motion of defendants' attorney to instruct the jury as follows: "The plaintiff, in permitting his stock to go at large in his field, through which the road of defendants passed, and said stock to upon defendants' road in the way of the passage of defendants' cars, was guilty of such a want of care on his part as to prevent him from maintaining this action, and they must find for defendants."

It is assigned for error that the circuit judge refused to give

this instruction. But no error in this was committed, and the instruction was properly refused, as the court was asked thereby to tell the jury in substance that in no state of case could a railroad company be made lawfully responsible for the destruction of property on their road, by running their trains upon it or over it, although done intentionally, or in a wanton manner, when it could be conveniently avoided without incurring any great risk or danger to the persons or property in the cars. Or in other words, that inasmuch as the road belongs to the company exclusively, and that they alone have lawful right and authority to run their trains upon it, and that the lawful purpose and the legitimate design of the creation of railroad companies and the construction of their roads is to have conveyed, with the greatest possible speed, property and persons along such roads, that therefore they have a right, recklessly and wantonly, to run their trains upon or over whoever or whatever comes upon or obstructs their track, although they might avoid it without being unreasonably delayed, and without danger or injury to the train and its contents—that is to say: “Stand off the track, keep off your stock, and let nothing obstruct our trains; if you do, we may and will, though it be not necessary, and can be easily avoided, with but inconsiderable loss of time, run over all such obstructions, and destroy all persons or property which may be in our way.” Railroad companies have no such license as this, and the first instruction was, therefore, properly refused.

On motion of the plaintiff's attorney, the court instructed the jury: “That although the plaintiff granted to defendants the right of way for their said road through his, plaintiff's, field or pasture, he, plaintiff, did not, by such grant, bind himself to make a fence on both sides of said road, through said field or pasture, or deprive himself of the use of said field or pasture, by suffering his horses, cattle, and other stock to be and remain on said field and pasture.”

This instruction is conveyed in language unskillfully selected, but stripped of its verbiage it is understood to mean simply that the plaintiff had not surrendered his right to pasture his stock upon his field, by granting to the railroad company the privilege of building their road upon it and through it, and that he was not bound to inclose his field so as to keep his stock from straying upon it. Considered apart from the purpose intended to be secured, and the conclusion of law designed argumentatively to be deduced from it, this instruction, taken literally, asserts

what are manifestly mere truisms. For it will not be denied that in the deed by which plaintiff granted the right of way over and through his pasture to the company, he did not bind himself to build fences on each side of the railroad, nor did there, by reason thereof, exist a positive legal obligation to do so, nor could the right of the plaintiff be questioned, if he thought proper to exercise it, to allow his cattle, horses, or hogs to feed upon this uninclosed pasture. But what was the purpose of this instruction? and how was it intended and probably made to apply to the case under trial? It was doubtless procured in order to lay a foundation for the conclusion that inasmuch as the plaintiff was not bound by law to inclose the field, and had a lawful right to feed his stock upon it, that the railroad company would be responsible in all cases for running their trains over and injuring or destroying such of his horses, cattle, or hogs, as might intrude and be upon their railroad. In other words, that it was the legal duty of the railroad company to inclose their road, or otherwise to prevent the intrusion of stock upon it; if not, that they would be responsible for all loss, injury, and destruction to stock occasioned by running their locomotives and cars upon their own road, in the manner and for the purposes contemplated by the law of their creation.

If the plaintiff was not bound to inclose his pasture because he had granted the right of way through it to the defendants for their railroad, neither as a consequence of the procurement and acceptance of the right of way was the company bound to inclose their track. If the plaintiff had retained the lawful right to continue the use of his field to pasture his stock, though not separated from the railroad by any inclosure, he of course must, in the exercise of that right, encounter all the risk voluntarily incurred by him of their loss and destruction.

The plaintiff acts with his eyes open. He knows his pasture is not inclosed, that his stock, unconscious of the danger, will, in feeding, probably intrude upon the railroad, which he has himself agreed may be run through his field. He knows the immense velocity and tremendous force with which the trains are driven upon these railroads, and the consequent imminent danger of destruction, if any obstruction should be encountered, which would thereby be incurred by the company's train, and by the persons and property thereby conveyed; and finally, he knows that the legal purpose and policy in the construction of railroads and the incorporation of railroad companies is to have conveyed freight and passengers, property and persons, with

the greatest possible speed through the country, and thus to save time, to cheapen travel and transportation, and promote the commercial prosperity of the country. And knowing all this, if the plaintiff chooses to permit his stock to have access to the defendants' railroad, and loss and destruction are the involuntary consequence, the railroad company ought not and can not be held responsible, unless it can be shown that such loss and destruction were caused by the wanton and reckless negligence of the company's agents; or in other words, the company can not be held responsible, unless the injury could have been avoided by the company's agents, with due regard to the safety of the train and its contents; or if the destruction of the plaintiff's stock, in this particular case, was accidental and not intentional, the loss should fall on the plaintiff, and properly, because he chose to encounter such risk by permitting his stock to go at large in an open field adjoining the road; and to subject the defendants to responsibility, it must be shown that the injury was not accidental, but the result of design, which design might be inferred from showing that the animal destroyed was observed in sufficient time to enable those governing the locomotive and cars certainly to avoid the injury without danger to the train itself, its contents, and without unreasonable delay, and by resorting to the usual expedients and precautions adopted under like circumstances.

The instruction marked A, quoted above, should therefore have been refused as misleading, or otherwise as containing mere abstract propositions, which, if true, could not solve the legal question presented in the case. The instructions B and C were properly overruled by the court, but the instructions given by the court as substitutes, or in lieu thereof, marked thus, X, XX, being inconsistent with the views of this court, of the principles of law as applicable to the facts of this case, should have been withheld from the jury. They were misleading, and did not state with sufficient accuracy and precision the proposition of law applicable to the case.

The court, however, upon the defendant's motion, gave the following instruction, which, as it is consistent with the views of this court as above expressed, and presents the proposition of law as applicable to this case correctly, is extracted from the record and adopted as a part of this opinion: "That if they believe from the proof that the plaintiff suffered his stock to go at large, and that they strayed upon the track of the rail[road], and were there killed accidentally by the train when it was run-

ning at customary railroad speed, they must find for the defendants, unless they should believe that they were intentionally injured and destroyed by the defendants or their agents, etc., in their employment."

Though proof of such fact would seem to be superfluous, yet the evidence was given to the jury that it is very hazardous for the trains in motion upon the track to encounter obstacles; and of course to escape the dangers and disasters incidental to such encounters of horses and cattle or other obstructions upon the railroad, it is to be presumed that those in charge of the trains would in no case intentionally run over and destroy stock being upon the road, if seen in sufficient time so as with safety to avoid it. It was therefore not necessary, in framing the above instruction, to have added the words, "unless they should believe that the stock was intentionally injured and destroyed by the defendants or their agents." For if the injury or destruction occurred accidentally, it could not have happened by design. If by the proof it appeared that the injury was intentionally committed, then the instruction, shorn of the needless addition above referred to, would not exonerate the defendants from responsibility.

The opinion of the supreme court of Pennsylvania, delivered in the case of the *New York & Erie Railway Company v. Skinner*, reported in the December number, 1852, of the *American Law Register* [S. C., since reported, 19 Pa. St. 298; 57 Am. Dec. 654], has been relied upon as authority in favor of the doctrines of law contended for by the defendants as applicable to this and all similar cases; but while it is admitted that that court, in the opinion cited, sustains to the utmost extent the principle as embodied in the instruction last above copied from the record, yet this court is not disposed to sanction all the legal doctrines avowed in that opinion.

Wherefore, for the errors indicated, the judgment is reversed, and cause remanded for a new trial, and further proceedings in conformity with this opinion.

RAILROAD COMPANY, LIABILITY OF, FOR KILLING ANIMALS ON ITS TRACK: See *Danner v. S. O. R. R. Co.*, 55 Am. Dec. 678; *Williams v. Michigan Cent. R. R. Co.*, Id. 59, and notes, where prior cases appearing in this series are cited.

THE PRINCIPAL CASE WAS AFFIRMED in *L. & F. R. R. Co. v. Ballard*, 2 Metc. (Ky.) 177, to the effect that a railroad company which is not bound to fence its track is not liable for injuries inflicted by its engines and trains upon cattle straying upon the track of the road, unless such injury was caused by the

wanton and reckless negligence of the company or its agents or servants. See also, to the same point, *O'Bannon v. C. & L. R. R. Co.*, 8 Bush, 350; *L. & N. R. R. Co. v. Wainscott*, 3 Id. 149, all determined by the same court which rendered the decision in the principal case.

YOUNG v. ADAMS.

[14 B. MONROE, 127.]

DEVISEE OF UNDIVIDED PART OF TRACT OF LAND MAY RECOVER to the extent of the undivided interest before partition.

HUSBAND'S ENTRY UPON LAND IN RIGHT OF WIFE, in which the latter has title to an undivided interest with others, will inure to the benefit of the other part owners, unless their interest is disputed and he claim the whole as belonging to his wife.

POSSESSION OF ONE TENANT IN COMMON is the possession of all, unless there be an actual ouster.

ONE OF SEVERAL TENANTS IN COMMON ENTERING UPON LAND necessarily acquires possession of the whole, unless he expressly limit his possession to a part. His possession in law is not adverse to his co-tenant, unless he imparts to it that character by claiming the whole of the land as his own, or denies his co-tenant right to any part of the same.

HUSBAND'S ENTRY UPON LAND IN RIGHT OF HIS WIFE can not afterwards prejudice her right by buying a title adverse to that right.

PLAINTIFF IN EJECTMENT MAY RECOVER TO EXTENT OF UNDIVIDED INTEREST shown in the lessor at the date of the demise.

SEPARATE TRIALS MAY BE ALLOWED, in the discretion of the court, when there are several defendants in ejectment and the testimony of one is material for his co-defendant.

EJECTMENT. Appeal from Taylor circuit. The facts are stated in the opinion.

Harlan and Shuck, for the appellants.

Cradock, for the appellee.

By Court, **SIMPSON, J.** James McCorkle, being the patentee of one thousand acres of land situated on Green river, devised to his niece, Margaret McCorkle, wife of William Adams, six hundred and thirty-three and two thirds acres, part thereof. His will bears date in February, 1794, and was proved and recorded in the month of May in the same year. William Adams, the husband of Margaret, the devisee, took possession in the year 1808, of the whole of the land contained within the boundary of the patent, and sold and conveyed parts thereof during his life-time to several individuals. He died in the year 1832, and his wife, not having joined with her husband in the sales made by him, subsequently commenced this action of

ejectment against his vendees, and those claiming under them, to recover the possession of the land. The suit was brought in the year 1849, and she having recovered a judgment for the whole of the land sold and conveyed by her husband during his life, the defendants have appealed.

The appellants controvert her right to recover any part of the land in this action, because she failed to identify by proof the particular part of the tract of land to which she was entitled under the will—the testator having devised her six hundred and thirty-three and two thirds acres only out of the one thousand acres which had been patented in his name. They contend that until a division of the land has been made, and her part been allotted to her, that she can not maintain an action to recover the possession of any of the land. This position is evidently untenable. She has, at least, an undivided interest in the land, and to the extent of that interest she has a right to the possession, in conjunction with the other tenants in common, from which she has been ousted by them.

On the other side, it is insisted that as the husband entered and took possession of the land in contest in right of his wife and under her title, his vendees are estopped to deny her right to it, and she is entitled to recover the whole of it in this action.

It appears probable that the testator, when he executed his will and when he died, was the owner of only two undivided thirds of the one thousand acres of land patented in his name, and that Knox and Taylor were the owners of the other undivided third part, being entitled to that much of it as locators; at least there was testimony upon the trial conducing to prove that such was the fact, which was corroborated by the circumstance that the testator had not made any disposition in his will of the remainder of the tract.

The manner in which the husband held the possession of the land after he acquired it, whether as the exclusive property of his wife, and whether he claimed to hold but two undivided thirds thereof in her right, and admitted the right of Knox and Taylor as locators to the residue, was a matter of controversy between the parties upon the trial. Although the husband had a right, by virtue of the title of his wife, to enter upon the land and take it into possession, yet such possession was not, in legal contemplation, exclusively for the benefit of his wife and himself, if she had a right only to an undivided part thereof, but it inured to the benefit of their co-tenants likewise, unless the right of the

latter to any part of the land was denied, and he claimed the whole of it as belonging to his wife. The mere fact that he took possession of the whole, if he admitted the right of his co-tenants to their part, did not prejudice them, but in reality operated in their favor, as the law under such circumstances conferred upon them all the advantages which their title could have derived from an actual possession by themselves. The possession of one tenant in common is the possession of all, unless there be an actual ouster or something equivalent thereto.

The testimony conduced to prove that when the husband took possession of the land he admitted the right of Knox and Taylor, as locators, to one undivided third part of it, and only claimed two thirds of it in right of his wife, and that he subsequently purchased the locators' third part from their agent, and paid him for it.

The circuit court instructed the jury upon the trial: "That if William Adams took possession of the McCorkle survey, under the claim of his wife Margaret, and afterward purchased a claim of Knox and Taylor to three hundred and thirty-three and one third acres of said land, that such purchase inured to and strengthened the claim and title of his wife, and no one to whom William Adams may have sold, or who claims under him, is allowed by law to set up any title or claim under such purchase of said three hundred and thirty-three and one third acres in opposition to the title and claim of Margaret Adams, and such a purchase presents no obstacle to her recovery in this suit." This instruction, under the facts and circumstances in this case, was evidently erroneous.

Where land belongs to several tenants in common, upon the entry of either, the person so entering necessarily acquires a possession of the whole, unless he expressly limit his possession to a part, because his interest, being an undivided one, extends to every part of the land, and when he enters he is seized of the whole and of every part; his possession, however, is not in law adverse to the right of his co-tenant, unless he imparts to it that character by claiming the whole of the land as his own, or denying the right of his co-tenant to any part of it; if he recognize this right, and do not act inconsistent with the relation that exists between them, the possession remains amicable and not adverse, and the co-tenant has a right to enter and take possession of his undivided interest therein at any time. If, therefore, Margaret Adams was entitled, as devisee, to an undivided interest of six hundred and thirty-three and two thirds

acres only in the tract of one thousand acres, and her husband entered on the land and took possession under her claim, that possession was not necessarily adverse to the right of the other tenants in common, but would only have been so in consequence of some act on his part manifesting this intention to deny their right, and hold the possession exclusively for himself and wife. The testimony, however, tends strongly to prove that no such exclusive possession was claimed, but that the husband always recognized and admitted the right of Knox and Taylor as co-tenants, and eventually purchased their claim.

The error in the instruction consists in his omission to make any discrimination between the possession of the husband, where the wife has title to the whole of the land, and where she has right to an undivided interest therein only. In the former case the possession would be exclusive, and being held for the benefit of the wife, her title could not be prejudiced by the act of the husband in purchasing an adverse title; in the latter case, however, the possession would not be exclusive, but would accord with the title, unless a different intention was indicated; and as it would be the legal duty of the husband to hold the possession consistently with the right of his wife, and also with the rights of the other tenants in common, the law would not presume that he had violated this duty, but the fact would have to be established by proof. The jury, therefore, should have been informed that the instruction given by the court was the law of the case, if they believed, from the testimony, that the husband took possession of the survey under the claim of his wife, and held and claimed the whole of the land as hers; but that, although he may have taken the possession of the land under her claim, yet if he admitted that she had a right to two undivided thirds of it only, and that Knox and Taylor were entitled to the other undivided third as locators, and did not claim the whole of the land as belonging to her, then the instruction did not apply, and no principle of law precluded the husband, under the circumstances last mentioned, from purchasing the undivided interest which belonged to the locators.

Although the quantity of land devised to Mrs. Adams did not amount to two thirds of the one thousand acres, it is probable that the testator intended to devise to her that quantity, and by mistake made it six hundred and thirty-three and two thirds instead of six hundred and sixty-six and two thirds acres; and if her husband, as the proof tends to show, while he held the possession under her title, claimed two undivided thirds of the

land in her right, she is entitled to recover to that extent against his vendees, even if there be a surplus in the tract over and above one thousand acres. The possession of her husband under her title, so far as he asserted that she had a right to the land, inured to her benefit, and as the persons in possession claim the land as their own, and deny her right to any part of it, she is clearly entitled to recover in this action to the extent that the land was held and claimed by her husband under her title as devisee, before the sale to his vendees.

If the undivided balance of the tract of land did not belong to the locators, but was owned by the patentee at the time of his death, then Mrs. Adams will be entitled to one undivided third part of that balance, as one of the three persons who are the heirs at law of the patentee, because, so far as she had title, either as devisee or heir, her husband's possession was for her benefit, and neither he nor his vendees are permitted to contest her right. But if Knox and Taylor were entitled to one undivided third part of the land as locators, and their right was recognized by Adams and wife, then a presumption arises, as more than half a century has elapsed since the death of the patentee, that the contract was executed, and the legal title transferred to Knox and Taylor or their vendees.

The statements made by the husband while he was in the possession of the land, with respect to the manner in which the possession was held, and the extent of his wife's right to the land, and the validity of the locator's claim, so far as such statements were made by him before he purchased from Knox and Taylor, are evidence against the plaintiffs in this action, inasmuch as she relies upon his possession to enlarge her claim as devisee, and strengthen and confirm her title to the land; and the admissions made by her since his death, in relation to the right of Knox and Taylor, as locators, to one third of the tract, and to the purchase thereof made by her husband, are clearly competent evidence against her.

It is evident that the testimony of Elijah Jones, one of the defendants, according to the principles herein settled, is material and important to his co-defendants, to enable them to sustain their defense to the plaintiff's action; the court should therefore exercise a reasonable discretion in permitting the other defendants to have him severed from them in their defense so far as to allow them to have a separate trial, that they may obtain the benefit of his testimony, if he has no interest in the land in their possession, nor in the result of the suit, so far as they are con-

cerned. But this matter must be left to the sound discretion of the circuit court, to be exercised with reference to the circumstances existing when such an application may be made, and in such a manner as will tend to promote the justice of the case, and not otherwise.

The court below not only committed an error in giving the instructions before mentioned, but all the instructions given to the jury that are inconsistent with the principles herein settled were erroneous.

Wherefore, the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

ACTUAL POSSESSION OF ONE PRIVY is constructively the possession of each according to his title, although the party in possession claimed to be in by an adverse title: *Nichols v. Reynolds*, 36 Am. Dec. 238; and the actual entry of one co-tenant inures to the benefit of all: *Vaughn v. Bacon*, 33 Id. 628, and note 629, where the subject is discussed at length. See also *Hart v. Gregg*, 36 Id. 166, and *Watson v. Gregg*, Id. 176.

TENANTS IN COMMON MAY SUE TOGETHER for the common estate, or each may sue separately for his part, and recovery may be had for the right which the plaintiff proves: *Hillhouse v. Mix*, 1 Am. Dec. 41. If the entire and indivisible thing is to be recovered, then the co-tenants should join, but otherwise they should not: *Malcolm v. Rogers*, 15 Id. 464.

LOWE v. BECKWITH.

[14 B. MONROE, 184.]

LETTER OF CREDIT IN FOLLOWING TERMS: "J. B. M. being about to commence retailing dry goods, I hereby undertake and contract with L. & Co. to become responsible to them for the amount of any bill or bills of merchandise sold by them to said M., agreeably to the terms of sale agreed upon by the parties, without requiring said L. & Co. to prosecute suit against said M. therefor," construed to be a continuing guaranty not limited to the first bill of goods bought.

LETTER OF CREDIT MUST BE CONSTRUED BY ITS OWN TERMS, but the general rule seems to be that they should be liberally construed.

NOTICE OF EACH SUCCESSIVE SALE OR ADVANCE made under a continuing guaranty is unnecessary.

NOTICE AND DEMAND MUST BE MADE OF GUARANTOR within a reasonable time after the goods are furnished on a continuing guaranty, in order to entitle the creditor to a recovery.

GUARANTY. Appeal from Louisville chancery court. The facts are stated in the opinion.

Haggin and Harris, for the plaintiffs.

Ripley, for the defendant.

By Court, SMITHSON, J. This action is founded upon a guaranty given by Jacob Beckwith, in favor of J. B. Maynard, by the following instrument of writing:

“LOUISVILLE, April 26, 1849.

“Mr. J. B. Maynard being about to commence the retailing of dry goods at Cannelton, Indiana, and desiring to open a credit with the firm of James Lowe & Co., of the city of Louisville, I hereby undertake and contract with said Lowe & Co. to become responsible to them for the amount of any bill or bills of merchandise sold by them to said Maynard, agreeably to the terms of sale agreed upon by the parties, without requiring said Lowe & Co. to prosecute suit against said Maynard therefor.

“JACOB BECKWITH.”

The plaintiffs averred in their petition, and proved upon the trial, that they accepted the defendant's guaranty on the day it was given, and notified him that they would sell merchandise to Maynard on credit, looking to the guaranty he had given them for indemnity. They also averred and proved that on the faith of said guaranty they had sold merchandise to Maynard from time to time, between its acceptance and the nineteenth of May, 1851, inclusive, amounting in the aggregate to several thousand dollars, and that the sum of four hundred and forty-three dollars still remained due to them on account of said sales, which Maynard had failed and refused to pay, although the payment had been demanded of him, of which the defendant had been duly notified.

The defendant admitted the execution of the writing relied on by the plaintiffs, but insisted that according to its terms he was only liable for the first purchases made by Maynard, which had been fully paid for, as appeared by the account of sales and credits which they exhibited. He also denied that he had been duly notified that Maynard was in default in paying for the goods sold to him by the plaintiffs, or that they looked to the defendant, on his guaranty, for the payment of the balance due them.

It appeared upon the trial that the first bill of merchandise was sold to Maynard by the plaintiffs on the twenty-sixth of April, 1849, and amounted to five hundred and thirty-six dollars. Other sales were made to him in each of the following months during the same year, and at various times during the ensuing year, and were continued to be made from time to time until the month of May, 1851. The sales were on a credit of either

four or six months. Partial payments were occasionally made by Maynard, whose purchases amounted in the aggregate during the whole time to four thousand four hundred and seventy dollars and twenty-eight cents, and the payments made by him to four thousand and twenty-seven dollars and twenty-eight cents. His payments on the eleventh of September, 1849, which had been made at different times, amounted to five hundred and thirty-six dollars, the exact amount of the first bill of merchandise sold to him by the plaintiffs; but the account, although balanced about the end of each year, had never been closed at any time, and the balance thus ascertained to be due paid or settled. This action was commenced in October, 1852, and it did not appear that the defendant was notified until within a few days before its commencement, and after Maynard had become insolvent, that he was in default in paying for the merchandise he had purchased of the plaintiffs, or that they considered the defendant liable for the balance due, although the last sales were made in May, 1851; nor did it appear that the guarantor had been informed, at any time during the period within which the sales were made, that the plaintiffs were continuing to make sales of merchandise to Maynard on the faith of his guaranty, although he was notified at the time it was given that it was accepted, and would be acted on by them.

Upon this state of the case, the court instructed the jury to find for the defendant, as in the case of a nonsuit, which instruction the court gave, and its correctness is the question now presented for our determination.

This instruction is attempted to be sustained on three distinct grounds: 1. The writing upon which the action is based is not a continuing guaranty, unlimited in amount and as to time, but a guaranty only of such goods as plaintiffs should sell Maynard to aid him in commencing business; 2. If the guaranty did not expire with the first sale of five hundred and thirty-six dollars, still the guarantor is discharged from responsibility, because he was not informed of the subsequent sales, as they were successively made; 3. That no notice of the extent of the sales, or of the amount for which the guarantor was held responsible, was communicated to him within a reasonable time after the expiration of the credit upon which the last sales were made, nor was he informed of the default of Maynard until he had become insolvent, and until a year or more had expired after the debt became due, and by this negligence of the plaintiffs he is discharged from all liability on his guaranty.

1. Neither the language nor the object of the letter of credit in this case will authorize the conclusion that it was intended and understood by the parties as a limited guaranty. The aid required was not merely to enable Maynard to "commence business," but he, being about to commence business, desired to open a credit with the plaintiffs, and the guarantor agreed to become responsible for the amount of any bill or bills of merchandise sold by them to him. The object contemplated was to enable Maynard to open a credit with the plaintiffs, and to purchase from them from time to time any bill or bills of merchandise that he thought necessary to the business in which he was about to embark. This object would only be accomplished by giving to the guaranty a continuing operation. It contains no limitation, either as to amount or time. The language used fairly admits of the construction that it was unlimited in duration, and it was no doubt so understood and acted upon by the plaintiffs.

We think the authorities are decidedly in favor of this interpretation. It is true that in these cases the construction of each instrument must depend on the language used in it, and consequently, the decision upon one can not be an authority for the construction of another, unless the language used in each be exactly similar; but still the manner in which courts have construed such instruments shows that they have been inclined to give them a liberal, and not a restricted, interpretation, and thus have furnished a rule which gives some aid in their construction.

In the case of *Douglass v. Reynolds*, 7 Pet. 113, the letter of credit was in the following language: "Gentlemen: Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so." The supreme court of the United States decided that this was a continuing guaranty for any debt not exceeding the amount specified which might be incurred under it, although an antecedent debt of the same amount might have been created on the faith of it, and have been previously paid.

In *Mason v. Pritchard*, 12 East, 227, the guarantor agreed "to be responsible for any goods he hath or may supply my brother with, to the amount of one hundred pounds;" and the court held that it was a continuing or standing guaranty to the extent

of one hundred pounds, which might become due at any time for goods supplied until the credit was recalled.

In *Merle v. Wells*, 2 Camp. 413, the guaranty was: "I consider myself bound to you for any debt he (my brother) may contract for his business as a jeweler, not exceeding one hundred pounds, after this date." Lord Ellenborough held it to be a continuing guaranty for any debt not exceeding one hundred pounds, which the brother might, from time to time, contract with the plaintiffs in the way of his business, and that the guaranty was not confined to one instance, but applied to debts successively renewed. Numerous other cases to the same effect might be adduced, but these are deemed sufficient for the purpose for which they are offered.

The strongest case on the other side that we have been referred to, or have been able to find, is that of *Rogers v. Warner*, 8 Johns. 119, which was on a guaranty, in these words: "If A. and B., our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish;" and the court held it to be a limited guaranty for a single credit. It may be remarked in reference to this case, that the language used in the guaranty does not seem to contemplate a continuing credit, or to indicate that the object was to enable the sons of the guarantor to continue to deal with the plaintiff. The guarantor does not state in his letter, as he does in the one upon which this action was brought, that the object was to open a credit with the house, nor does he agree to pay any bill or bills of merchandise that might be sold on the faith of the guaranty, which statement, if it had been made, would naturally imply that a series of transactions between the parties was contemplated; and in this respect the cases are clearly distinguishable from each other.

We think, therefore, that the construction we have given to the present letter is just and reasonable, and is authorized by the language used, and entirely consistent with the intention and understanding of the parties.

2. As this was a continuing guaranty, providing for a series of transactions, and the guarantor was notified of its acceptance, and the intention of the plaintiffs to act under it, he must necessarily have understood that there might be successive sales made, from time to time, according to its terms, and he had no right, therefore, to require that notice should be given him of each sale as it should be made. In the case of *Douglass v. Reynolds*, 7 Pet. 113, it was expressly decided that in the

case of a continuing guaranty it was not necessary that every successive transaction under it should be communicated from time to time to the guarantor. See also, on the same point, *Wildes v. Savage*, 1 Story, 22.

3. But a more important question arises as to the duty devolving upon the person accepting such a guaranty as this, and giving credit upon it, after the transactions have been completed and the debt has become due, and default has been made by the person primarily liable. This question, we believe, is now presented for the first time in this court. It was decided, in the case of *Kincheloe v. Holmes*, 7 B. Mon. 5 [45 Am. Dec. 41], that due notice of the acceptance of a guaranty is necessary, and it was said that, as such notice is sufficient to put the guarantor on his guard, the court was not prepared to decide that the creditors, after giving such notice, would be bound to use greater diligence in demanding payment from the principal than a man of ordinary prudence would use in his own case. But as the question did not directly arise in that case, it was not decided; nor did the court authoritatively determine that the law imposed upon the creditor, in such a case, the exercise of any diligence whatever.

4. The contract of the guarantor in this case consisted, substantially, either in an undertaking to pay the debt, in case the principal debtor should fail to do so, or in an undertaking that the debt should be paid by him. The extent of the liability that might arise under the guaranty was indefinite, and in some degree optional with the party who was to act under it. As subsequent events, which were at least partially under the control of the plaintiffs, might determine the amount of this liability, a knowledge of which would be necessary to enable the guarantor to comply with his contract, it might be argued that this information should have been communicated to him before he could be considered in default; but even this can not be conceded, inasmuch as the amount for which he was responsible did not rest exclusively in the knowledge of the plaintiffs, but was also known to the person in whose favor the guaranty was given, from whom he could have obtained the requisite information. If, however, notice of his liability was necessary before a cause of action would accrue against the defendant, such a notice could be given at any time, and was given in the present case before the action was brought.

It is contended, however, that to make the guarantor responsible for the debt, it is incumbent on the plaintiffs to show that

payment of it by the principal was demanded, and notice of his failure to pay given to the defendant within a reasonable time after the debt fell due.

The existence of such an obligation on the part of the person to whom a guaranty is given was recognized in the case of *Douglass v. Reynolds*, *supra*, and it was decided that unless such demand was made, and notice thereof given in a reasonable time to the guarantor, he would be wholly discharged from his undertaking. The same case was subsequently brought before the supreme court of the United States, 12 Pet. 497, and by reference to the opinion then delivered, it will be seen that a modified view of this question was taken, and instead of deciding that a demand and notice of the default constituted an essential ingredient in the case of the plaintiff, in a suit brought on a guaranty, it was held that a failure to do so was mere matter of defense, to be set up and relied upon by the defendant, but would be available as such only to the extent of the injury he had sustained by the omission, and be wholly immaterial where no injury had resulted from it. The doctrine upon this point, in this modified form, has been recognized and followed by the supreme courts of several of the states: *Howe v. Nickels*, 22 Me. 175; *Smith v. Bainbridge*, 6 Blackf. 12; *Salisbury v. Hale*, 12 Pick. 424.

By other courts this rule has been altogether denied, and it has been held "that where the undertaking is for the performance of a third party, it is sufficient to establish the existence of a default by the latter, which necessarily involves a breach of the guaranty, and that as no evidence of demand would be requisite for that purpose were the suit against the principal, the same rule must prevail where it is against the guarantor:" *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288]; *Douglass v. Howland*, 24 Wend. 35; *Train v. Jones*, 11 Vt. 444; *Peck v. Barrey*, 13 Id. 93.

Considering the great diversity of opinion that exists, we feel at liberty to adopt such a rule on this subject as will be just in its operation and of easy practical application, especially in relation to such guaranties as the one sued upon. The rule laid down in the case of *Douglass v. Reynolds*, *supra*, and which has been followed in its modified form by the courts of the several states, seems to rest upon a peculiar rule of commercial jurisprudence. Its application is difficult and uncertain in its results, involving as it does not only the question of "reasonable time" in each case, but also the additional question of the extent of injury

that has been sustained by the guarantor by the failure to make a demand on the principal debtor, and in case of his default to give notice of it. In what manner is the injury to be ascertained? Must it be determined by the condition of the principal debtor at the time performance is to be made by him, or within a reasonable time thereafter? and if he were then insolvent, does the presumption arise that no injury has been sustained by the guarantor, but that if he were then solvent, a contrary presumption is to be indulged? Or must an additional inquiry be instituted in order to ascertain whether an indemnity could have been obtained from the principal debtor, had due notice of his default been given? Even if solvent, he might have been unwilling to have given an indemnity, and as, in that event, the guarantor could not have been able to secure himself against loss, he would not have sustained any actual damage by the failure to make a demand, and to give notice of the default. This rule, if unexceptionable in every other respect, would certainly be very inconvenient, difficult, and impracticable in its application.

Where the meaning of a guaranty is assumed to be that a third person shall pay a debt, or where it is, that in case of a default on the part of the latter the guarantor will undertake the performance himself, and the guaranty sued upon in this case imports, undeniably, one or the other of these undertakings, then there does not seem to be, according to the well-established principles of the common law, any obligation upon the creditor to demand payment of the debtor primarily liable, but it is the duty of the guarantor, by inquiring of his principal, to ascertain whether payment has been made, and if not, to make it himself, in pursuance of his contract to that effect: *Douglass v. Howland*, 24 Wend. 35; *Oxley v. Young*, 2 H. Black. 613.

On the other hand, where the meaning of a guaranty is, that the debt created under it will be a good debt, or that the party in whose favor it is given will be able to comply with his engagements when they fall due, or that the person to whom the guaranty has been addressed will be safe, in the business sense of the term, in giving the credit referred to, there can be no breach of a collateral undertaking of this nature, until it is shown that the debt created under such a guaranty could not, when it fell due, be collected, the party trusted was insolvent, or the creditor unable, by the use of ordinary diligence, to obtain the payment of the debt.

Upon such a guaranty as the present, notice to the grantor of

its acceptance and an intention to act under it in pursuance of its terms is necessary, because it is in the nature of a proposition, which the party addressed may accept or reject at his option, and until accepted does not constitute a contract between the parties. But no additional obligation devolves upon the creditor. The guarantor, by applying to the party in whose favor the guaranty has been given, can obtain information as to the extent of the liability incurred under it, and also whether such liability has been discharged or still exists; and if he has undertaken that the debt shall be paid by the debtor when it falls due, its non-payment by him necessarily involves a breach of this undertaking; or if his contract be that he will pay it himself in the event of its non-payment by the debtor, the default of the latter renders his undertaking absolute, and he becomes immediately liable to an action, inasmuch as it is his duty, according to the very terms of his contract, to pay the debt without demand or notice. This will form a safe and sound rule upon the subject, and by its practical operation render a guaranty of this description, when accepted and acted upon, of some value to the party who has dealt upon the faith of it, and trusted to it to secure the payment of his debt.

The result of these views is, that none of the grounds relied upon is sufficient to sustain the correctness of the instruction given to the jury by the court below. Wherefore, the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

CONTINUING GUARANTIES, WHAT ARE AND WHAT ARE NOT: See *Fellows v. Prentiss*, 45 Am. Dec. 484; *Crenshaw v. Jackson*, 50 Id. 361; *Union Bank v. Coster*, 53 Id. 50; *Menard v. Scudder*, 56 Id. 610, and notes to same.

DEMAND AND NOTICE NECESSARY TO CHARGE GUARANTOR: *Whiton v. Mears*, 45 Am. Dec. 233, and note. As to discharge of surety by indulgence to principal, see note to *Fellows v. Prentiss*, 45 Am. Dec. 484.

GUARANTIES ARE SUBJECT TO SAME RULES OF CONSTRUCTION, evidence, and sufficiency of consideration as are applied to other contracts: See note to *Union Bank v. Coster*, 53 Am. Dec. 50.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

LAPENE v. SUN MUTUAL INSURANCE COMPANY.

[8 LOUISIANA ANNUAL, 1.]

WARRANTY OF SEAWORTHINESS DURING WHOLE VOYAGE is the same, as a general rule, whether the insurance be on the ship or on goods; and the underwriters are not bound for any loss resulting from that cause commencing after the voyage.

UNSEAWORTHINESS EXISTING AT COMMENCEMENT OF VOYAGE, which is remedied before loss, will not bar a recovery under the policy.

DEVIATION FROM COURSE OF VESSEL WILL NOT VITIATE POLICY of insurance when the deviation has occurred through necessity.

APPEAL from the fifth district court of New Orleans. Action brought by Lapene & Ferre, plaintiffs, against Sun Mutual Insurance Company of New York to recover amount due on a policy of insurance. The facts are fully stated in the opinion.

Roselius, for the plaintiffs.

Maybin, for the defendants.

By Court, EUSTIS, C. J. This is an action to recover the sum of eight thousand dollars, the amount of merchandise shipped on board the schooner William C. Preston, and insured by the defendants for a voyage from New Orleans to the port of Brazos in the state of Texas. There was judgment for the plaintiffs, and the defendants have appealed.

The vessel in which the merchandise was shipped was of some fifty tons burden, and lay at the old basin. The defense is, that she was not seaworthy, and that she deviated from the proper course of the voyage.

It appeared that the schooner left the basin on the second of

August, 1851, and from the difficulty in the navigation of the bayou St. John, she did not get over the bar and leave the Picketts on her voyage until the sixth following. On Friday, the eighth, she put into the bay of St. Louis for the purpose of obtaining water. She made sail, after taking in her water, on the ninth, and three days after was burned off Breton's island, and with her cargo totally lost. During the delay of the vessel at the mouth of bayou St. John, the captain, not knowing, as he says, when there would be water enough to take her over the bar, left her on a visit to his father-in-law at the bay of St. Louis, and only joined the schooner at about twenty miles from that place, and one or two miles from the Rigolets. Finding her short of water, he put into the bay of St. Louis in order to procure it.

The exertions of those on board to get the fire under being unsuccessful, she was abandoned, in consequence of the danger created by her having gunpowder and spirits on board; in a few minutes after she exploded, and everything on board, including the log-book, was lost.

The case appears to have been tried in the court below in such a manner as not to have elicited reasons for the judgment, or any statement of the grounds on which it was given.

There does not appear to have been any attempt to contradict or weaken by counter-evidence the testimony of the plaintiffs' witnesses. A single witness was examined for the defense on a point about which there is no contest. The evidence has been much commented upon in this court. It was believed by the district judge, and has not been successfully impugned by the scrutiny before us.

The want of water was caused, as is said, by the negligence of one of the men in leaving open the cock of one of the pipes containing water, and we think the evidence establishes such a condition of necessity as authorized the delay and deviation at the bay of St. Louis in order to procure it.

We think there is nothing in another ground of defense urged in this court, viz., that the risk was unduly enhanced by there being gunpowder among the plaintiffs' goods. The invoice shows that some twenty kegs of powder were on board. We do not find any exception in the policy as to gunpowder. It is construed in the general terms "lawful goods and merchandise," under which the plaintiffs insured, and is an article notoriously suitable to the market to which the cargo was destined. It clearly comes within the word "cargo," which is indorsed on the policy: See 2 Duer on Ins. 444. It is contended that the schooner

was not seaworthy, in a technical sense, because at the time she sailed on her voyage her captain was not on board. He was on board at the time she broke ground in the basin on the second of August, and continued in her after her arrival at the Picketts. Finding she could not cross the bar without removing her cargo, he left her in charge of the mate on a visit to the bay of St. Louis, as has been before stated. It is admitted in argument that she was unseaworthy in making sail in this condition without her captain on board, and if a loss had happened while it continued, that the underwriters would not have been responsible; but it is urged that the effect of the unseaworthiness is not continued beyond the existence of the cause that produced it, and as the loss had no connection with this cause, but was from a peril insured against, the underwriters are bound to indemnify the insured.

As a general rule, the warranty of seaworthiness during the whole voyage is the same, whether the insurance be on the ship or on goods, and the underwriters are not bound for any loss resulting from that cause after the commencement of the voyage: *McDowell v. Gen. Mutual Ins. Co.*, 7 La. Ann. 684 [56 Am. Dec. 619], and cases there cited.

Lord Tenterden, in the case of *Weir v. Aberdeen*, 2 Barn. & Ald. 320, asserted the law to be, that if there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy. This doctrine is understood to have been called in question in the opinion of the supreme court of the United States, delivered by Mr. Justice Story in the case of *McLanahan v. The Universal Ins. Co.*, 1 Pet. 184. We delayed the decision in the cases of insurance on cargo by this vessel for the purpose of considering the possible objections to this just and reasonable principle. It has received the approbation of Kent; and Judge Phillips, in his work on insurance, has placed it beyond all question as a settled rule of American jurisprudence. This learned author thus states it: "This warranty [of seaworthiness] is not violated so as to defeat the insurance by a merely accidental, temporary deficiency at the commencement of the risk in fitness for the voyage, that may be easily remedied, and is so in fact. There are many cases which have been decided on this principle. One was of the needle of a compass attracted by some iron-work; another of a vessel being temporarily unseaworthy for want of sufficient ballast; another of a cargo so stowed as to cause the vessel to be out of trim; another of a vessel not having a pilot, and yet getting safe over

pilot ground:" Phill. Ins., No. 726. The courts of New York have decided in the same sense. In the case of *The American Ins. Co. v. Ogden*, 15 Wend. 532; S. C., 20 Id. 287, the supreme court of that state decided that the fact that a vessel was not supplied with anchors when she left port can not discharge the insurers when the loss was sustained from an injury received from the winds and waters while the vessel was at sea, where it was totally immaterial whether she had one or two anchors, or none at all, so far as the injury is concerned.

This temporary unseaworthiness, occasioned by the absence of the captain from the schooner on her passage down Lake Pontchartrian, and through the pass of the Rigolets, constitutes no defense to the plaintiffs' action.

Conceding that the loss of the water from the cask, which created the necessity for the deviation in putting into the bay of St. Louis, to have been the consequence of the neglect of those on board of her, we consider the fact of deviation as being no defense to this suit. It is not proved that the neglect occurred during the absence of the captain from the schooner. If it had been, a materially different case would have been presented: *Waters v. The Merchants' Louisville Ins. Co.*, 11 Pet. 224; Phill. Ins. 733, 734.

There is nothing in this case which creates any suspicion which affects injuriously the plaintiffs, who were shippers of part of the cargo. At the same time, the complexion of the facts which appear in evidence is such as to authorize us in expressing our regret that the case was not sifted to the bottom. So far as our action is concerned, however, we are bound to presume that the underwriters have left it in the situation the most favorable to their interests, and we must decide it accordingly on the evidence.

It is proper to observe that under all the policies on goods shipped on board this vessel, the barratry of the master and mariners is one of the risks insured against.

The judgment of the district court is therefore affirmed, with costs.

IN EVERY POLICY OF MARINE INSURANCE THERE IS IMPLIED WARRANTY OF SEAWORTHINESS, and this is a condition precedent on the part of the insured: *Hasard's Adm'r v. N. E. Maine Ins. Co.*, 8 Pet. 557. Every person who proposes to any insurers to insure his ship against any sea perils during a certain voyage impliedly warrants that his ship is in every respect in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety. In *Dixon v. Sadler*, 5 Mee. & W. 405, the court held the rule to be as follows: "In the case of an insurance for

a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage insured at the time of sailing upon it." To the same effect see also the following cases: *Prescott v. Union Ins. Co.*, 30 Am. Dec. 207; *Myers v. Girard Ins. Co.*, 26 Pa. St. 192; *Cincinnati Mutual Ins. Co. v. May*, 20 Ohio, 211; *McCargo v. Merch. Ins. Co.*, 10 Rob. (La.) 334. This warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and if this condition be broken, at the inception of the risk, in any way whatever, and from any cause whatever, there is no contract of insurance, the policy being wholly void: *Tidmarsh v. Washington F. & M. Ins. Co.*, 4 Mason, 439; *Wallace v. De Pau*, 2 Am. Dec. 662; *Marcy v. Sun Mutual Ins. Co.*, 11 La. Ann. 748; *Small v. Gibson*, 16 Q. B. 128.

SEAWORTHINESS MAY BE WAIVED OR MODIFIED BY PARTIES.—Seaworthiness is not an absolute requirement of the law, it may be waived or modified in any way by the parties, they agreeing that the ship shall be insured whether seaworthy or not: *Parfitt v. Thompson*, 13 Mee. & W. 392; *Phillips v. Nairne*, 4 C. B. 343. As to what constitutes a waiver of the implied warranty of seaworthiness, it has been held that a survey of the vessel for the underwriters by their agent does not: *Dawson v. Cawley*, Newfoundland Cas. 433. On this point the court held, in *Myers v. Girard Ins. Co.*, 26 Pa. St. 192, that "all the authorities establish that a waiver of seaworthiness, when not expressed in the contract of insurance, is only to be inferred upon clear evidence that the insurer knew that the vessel was unfit to perform the voyage insured, or that a full representation was made by the assured of the defects of the ship before the completion of the contract." In passing upon this case the learned court cited *Weddenham v. Bell*, 1 Camp. 1; *Wilkie v. Geddes*, 3 Dow. 57; *Hilliard on Marine Ins.* 106; *Marsh. Ins. b. 1, c. 1181*; *Fleming v. Marine Ins. Co.*, 3 Watts & S. 152; S. C., 33 Am. Dec. 33. An advertisement stating that an insurance company would insure goods upon certain enumerated boats, would, as to them, amount to a waiver of the implied warranty of seaworthiness: *Natchez Ins. Co. v. Stanton*, 2 Smed. & M. 340. The party insured may stipulate that any unseaworthiness existing of which he may be ignorant shall not affect his insurance: *Vallejo v. Wheeler*, Cowp. 143. But without such a clause the policy is just as much avoided by any actual unseaworthiness which neither was known nor could be known to the insured as if it were known to or caused by him: *Warren v. United Ins. Co.*, 1 Am. Dec. 164; *Barnewall v. Church*, 2 Id. 180; *Taylor v. Lowell*, 3 Id. 141; *Lee v. Beach*, Park. Ins. 297, 298; *Marsh. Ins.* 160; *Porter v. Bussey*, 1 Mass. 436; *Dupeyre v. Western M. & F. Ins. Co.*, 2 Rob. (La.) 457. In *Douglas v. Scougall*, Lord Eldon laid down the law as follows: "It is not necessary to inquire whether the owner acted honestly and fairly in the transaction, for it is clear law that however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable."

SEAWORTHY AND PORTWORTHY DISTINGUISHED. — If the insurance is at and from a port, there is no implied warranty in the nature of a condition precedent to the attaching of the policy in the port, that the vessel shall be then seaworthy in the sense of being fit for sea. In other words, if the vessel is in port she may be seaworthy for that place, although not for sea. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, is a case in point. The court, in passing judgment, said that "seaworthiness in port or for temporary pur-

poses, such as mere change of position in the harbor, or proceeding out of port, or lying in the offing, may be one thing, and seaworthiness for a whole voyage quite another. A policy on a ship at and from a port will attach, although the ship be at the time undergoing extensive repairs in port, so as in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy." In *Abithol v. Bristow*, 6 Taunt. 464, Gibbs, C. J., speaking of a vessel in port, said: "She need have no other men on board than such as are necessary to prevent fire or the like accidents; no sails, provisions, or equipment are necessary." See also *Cruder v. Phila. Ins. Co.*, 2 Wash. 262; *Annen v. Woodman*, 3 Taunt. 299; *Smith v. Surridge*, 4 Esp. 25; *Motteux v. Lond. Ass. Co.*, 1 Atk. 545; *Forbes v. Wilson*, Park. Ins. 299, note; *Taylor v. Lowell*, 3 Am. Dec. 141; *Paddock v. Franklin Ins. Co.*, 11 Pick. 227; *Ingraham v. South Carolina Ins. Co.*, 2 Treadw. Const. 707. The insurance may be for a mere temporary purpose; as going from one harbor to another. In *Cobb v. N. E. Mut. Ins. Co.*, 6 Gray, 192, insurance was effected on a vessel when waterborne, at and from Perry, with permission to go to Eastport and thence to a southern port. It was held that it was sufficient if the vessel was in a fit condition to go to Eastport when she sailed for that place, although she was not fit for sea. Insurance may be effected for a brief navigation upon inland waters: *Bell v. Reed*, 4 Binn. 127; or while being simply launched: *Frichette v. State Mutual Ins. Co.*, 3 Bosw. 190. So if there be insurance on ship and goods while in port, that on the ship may be valid because she is in a sufficient condition for a ship in port. This is the rule laid down by Mr. Phillips in his work on insurance, referred to by the court in the principal case, and he thinks it is in accordance with general and recognized principles: 1 Phill. Ins., sec. 723, and cases there cited. See also *Taylor v. Lowell*, *supra*; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56; *Cruder v. Penn. Ins. Co.*, 2 Wash. 339. In *Weir v. Aberdeen*, 2 Barn. & Ald. 320, it was held that where there was a deficiency at the commencement of the risk amounting then to unseaworthiness, so that the policy does not then attach in the sense that if a loss occurs the insurers are liable, yet if this deficiency be temporary, capable of speedy and effectual remedy, and is in fact soon remedied, the policy may attach as soon as the vessel becomes seaworthy. See also *McLanahan v. Universal Ins. Co.*, 1 Pet. 170; *Deblois v. Ocean Ins. Co.*, 16 Pick. 303; *Chase v. Eagle Ins. Co.*, 5 Id. 51.

DEVIATION CAUSED BY NECESSITY—EFFECT ON POLICY.—If an accident happen whilst the property is at the risk of the underwriters, and can not be repaired at the port of departure, the vessel may go to the nearest port for the purpose, and she continues in the same situation as to the insurance as if she had been repaired at the port of departure. The insured are bound to prove that it was necessary to proceed to another port, and that the vessel went to the nearest port at which her wants could be supplied: *Cruder v. Phila. Ins. Co.*, 2 Wash. 262; compare *Hutton v. American Ins. Co.*, 7 Hill, 321. If the master, in departing from the usual course of the voyage from necessity, acts *bona fide*, and according to his best judgment, the voyage will be protected by it: *Turner v. Protection Ins. Co.*, 25 Me. 515. So a delay which is necessary to accomplish the objects of the voyage, according to the course of trade, if made *bona fide*, will not be a deviation to avoid a policy on a round voyage. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 384; *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241; *Thorndike v. Bordman*, 4 Pick. 471. If a vessel be driven into a port of necessity, and a pestilence break out that prevents her pursuing her voyage, it is a loss within the policy: *Williams v. Smith*, 2 Cai. 1. When a vessel insured against sea risks only was turned away

from a port by a ship of war, on account of a blockade, and in her passage to another port was lost, the deviation is excused by necessity, and does not avoid the policy: *Robinson v. Marine Ins. Co.*, 2 Johns. 89. Where a vessel departs from her course upon seeing another in apparent distress, in order to ascertain if persons need relief, and affords the same, it is not a deviation: *Crocker v. Jackson*, 1 Sprague, 141. And a delay to save lives which are in jeopardy is no deviation: *Box of Bullion*, 1 Id. 57; *The Boston*, 1 Sumn. 328; *The Henry Enobank*, Id. 400; *Lettle v. St. Louis etc. Ins. Co.*, 7 Mo. 379. But a deviation to save property merely will invalidate the policy. See the five cases last named. It is generally conceded that the rule in regard to this branch of the subject is, that the smallest deviation from the usual course of the voyage without a justifiable necessity discharges the underwriters, although the loss was not the immediate consequence of the deviation: *Martin v. Delaware Ins. Co.*, 2 Wash. 254; *Stetson v. Mass. Ins. Co.*, 4 Mass. 330; *Brazier v. Clapp*, 5 Id. 1; *Breed v. Eaton*, 10 Id. 21; *Kettle v. Wiggin*, 13 Id. 68; *Wiggin v. Amory*, 14 Id. 1; *Merrill v. Boylston etc. Ins. Co.*, 3 Allen, 247; *Natchez Ins. Co. v. Stanton*, 2 Smed. & M. 340; *Garyan v. Ohio Ins. Co.*, Wright, 202; *Jolly v. Ohio Ins. Co.*, Id. 539; *Hood v. Nesbit*, 1 Am. Dec. 265; *Riggin v. Patapsco*, 16 Id. 302; *Himely v. S. C. Ins. Co.*, 12 Id. 623.

For a further discussion of the points involved in this note, as well as the subject of seaworthiness and marine insurance generally, see the following cases in this series and the notes thereto: *Earl v. Shaw*, 1 Am. Dec. 117; *Patrick v. Ludlow*, 2 Id. 130; *Brown v. Girard*, Id. 400; *Garrigues v. Cox*, Id. 493; *Talcot v. Commercial Ins. Co.*, 3 Id. 406; *Reade v. Commercial Ins. Co.*, Id. 495; *Clark v. United Ins. Co.*, 5 Id. 50; *Haff v. Marine Ins. Co.*, Id. 331; *Savage v. Pleasants*, 6 Id. 424; *Miller v. S. C. Ins. Co.*, 13 Id. 734; *McFee v. S. C. Ins. Co.*, Id. 757; *De Blois v. Ocean Ins. Co.*, 28 Id. 245; *McMillan v. Union Ins. Co.*, 33 Id. 112; *Whitney v. Ocean Ins. Co.*, Id. 595; *Caldwell v. Western M. & F. Ins. Co.*, 36 Id. 667; *St. Louis Ins. Co. v. Glasgow*, 41 Id. 661; *American Ins. Co. v. Insley*, 47 Id. 509; *Bradley v. Nashville Ins. Co.*, 48 Id. 465; *Nelson v. Suffolk Ins. Co.*, 54 Id. 770; *Rugely v. Sun Mutual Ins. Co.*, 56 Id. 603; *McDowell v. General Mutual Ins. Co.*, Id. 619.

WESSON v. GARRISON.

[8 LOUISIANA ANNUAL, 136.]

BILL OF EXCHANGE PRESENTED FOR PAYMENT at the office of the drawees to book-keeper of the latter, and not honored by him, held to be a sufficient presentment, and it was unnecessary for the notary to certify that the drawees were not present at the time of presentment.

DRAWEE OF BILL HAS NO RIGHT TO DELAY HOLDER by calling in the acceptor in warranty unless the former has paid the same.

APPEAL from the district court, seventh district, parish of East Feliciana. D. and A. Wesson, plaintiffs; Garrison & Fuqua, defendants. Action brought to recover amount due on a bill of exchange. Judgment for the plaintiffs, and the defendants appealed. The other facts appear in the opinion.

Merrick, for the plaintiffs.

Pond, jun., for the defendants.

By Court, SLIDELL, J. We think the district judge did not err in treating as an answer what the defendant styled a peremptory exception.

The bill was properly protested on the third day of grace, fourth of February, the request in the body of the bill being to pay on the first of February. The bill was drawn in New York on a New Orleans drawee. The discussion in the appellants' brief of foreign usage is utterly irrelevant.

The protest states that the bill was presented for payment at the office of G. Burke & Co., the drawees, to a gentleman styling himself book-keeper of that house, and who stated that he was duly authorized to answer the bill would not be paid. This was a sufficient presentment, and it was not necessary the notary should certify that the drawees were at the time absent from their counting-room.

In their answer the defendants alleged that they had funds in the hands of G. Burke & Co. to meet the bill, and that, by accepting, they undertook to pay it, and the defendants asked leave to cite them in warranty, which the court refused. We do not consider the relation of drawer and acceptor as creating a right to call in warranty, under article 379 of the code. It has not been so understood in practice, and does not fall within the strict terms of the code. The drawer has his recourse against the acceptor when he has paid, but has no right to delay the holder until he can bring him in: See *Lanusse v. Massicott*, 3 Mart. 261.

We think this appeal was taken for delay, and the appellants' prayer for damages must be sustained.

Judgment affirmed, with twenty dollars as damages for a frivolous appeal.

PRESENTMENT, TO WHOM AND HOW SHOULD BE MADE.—The following brief statement furnishes a good illustration of the general rule in Louisiana relative to presentment and demand of payment of negotiable instruments. Where a note is payable at a particular place, a personal demand on the drawer can not always be made, and is not required. It is sufficient if the demand is made of any person at the place designated: *Gale v. Kemper's Heirs*, 10 La. 205; see also *Baker v. Fullerton*, 11 La. Ann. 25, to the same effect. Where a note is payable at a bank, a demand there of one apparently in charge of its affairs as cashier or agent, if the maker be not present, is sufficient. The holder is under no obligation to present it elsewhere, nor personally to the maker: *N. O. & C. R. R. Co. v. McKelvey*, 2 Id. 359. So a presentment to the proper book-keeper at the bank where the note is payable, and demand of him, are sufficient: *Armor v. Lewis*, 16 La. 331. In another case, where a demand had been made upon the cashier of the bank where the note was payable, and the cashier replied that there were no funds in the

bank to pay the note, the court held that no presentment was necessary: *Union Bank v. Lea*, 7 Rob. (La.) 75. In *Union Bank v. Morgan*, 2 La. Ann. 418, the court held that where a demand had been made upon the president of the bank where the note was payable, it was sufficient. For a further illustration of what constitutes presentment, see *Windham Bank v. Norton*, 56 Am. Dec. 397; *Jones v. Robinson*, 54 Id. 212; *Rice v. Ragland*, 53 Id. 737, and notes citing prior cases in this series.

FULLER v. COWELL.

[8 LOUISIANA ANNUAL, 126.]

VENDOR'S IGNORANCE OF MANNER IN WHICH GOODS SOLD BY HIM HAVE BEEN PACKED will not exempt him from liability for the difference between the value of the packages in their actual condition and what it would have been if the packages had been uniform and corresponded with the samples by which the sale was effected. The measure of damages in such cases is the difference in value of the actual contents and the contents represented to be in the packages at the time and place of sale.

APPEAL from the fourth district court of New Orleans. Josiah D. Fuller, plaintiff, Robert W. Cowell, vendor, and Mushet & Pearson, warrantors, defendants. Action to recover on loss sustained on the purchase of a number of bales of cotton. The complaint charged that "the outside of said bales was composed of good, sound, and merchantable cotton, extending farther into the interior of the bales than the usual mode of inspection would enable a person to examine," and "that said bales were plated on the outside with sound and merchantable cotton, but were falsely packed in the interior of the bales with cotton badly damaged," etc. The plaintiff recovered judgment, and defendants appealed.

Bonford and Finney, for the plaintiff.

Benjamin and Micou, and Wolfe and Singleton, for the defendants and warrantors.

By Court, SLIDELL, J. Although there is a conflict of testimony, our minds have been brought to the same conclusion as the district judge came to, that is to say, that the cotton in the interior of the bales was of a decidedly inferior quality to that of the outer portion; in other words, that the cotton was what was called in the market falsely packed. Such packing, it is proved, is not discoverable by the usual examination which buyers make. The plaintiff, it is true, admitted at the trial the defendant was not aware of this false packing; but this absence of knowledge does not exempt the vendor from liability for the

difference between the value of the bales in their actual condition and what it would have been if the quality throughout the bale had been uniform.

There was an effort at the trial below, and in argument here, to avoid responsibility, on the ground that this cotton had been repacked in New Orleans, in consequence of a fire having occurred at the press where it was stored, and that the fact of its having been repacked was communicated to the plaintiff. And witnesses were called to prove that repacked cotton is not considered as favorably in the market as cotton which has not undergone that process. The reason, as stated by a cotton dealer is, "that in repacking cotton they have to pick it out in various piles, and through carelessness there may be a slight mixture, and in repacking, occasionally a rope might be picked up. Buyers of repacked cotton know these facts." But this evidence is insufficient to account for the condition of the cotton in question, or to exempt the defendant from liability. There was here, according to the testimony of the plaintiff's witnesses, to whom the district judge gave credence, a marked discrepancy between the outer cotton and the interior of the bales, which can only be accounted for on the hypothesis of false packing. Moreover, in this case, samples were furnished by the seller to the buyer, and the classer employed by the plaintiff testified that he found, on drawing samples from the edge of the bales in the usual manner, that they corresponded with the samples so furnished. The witnesses concur in stating that false packing is not discoverable by taking samples from the bales in the usual manner.

In a case of this sort, where the seller is not cognizant of the hidden defects of the thing sold, he is liable for the difference at the time and place of sale between the actual value of the bales thus falsely packed, and what they would have been worth if the entire contents had corresponded with the outer portion. The actual loss incurred by the plaintiff in the foreign market, where he sold the cotton, had it been thrown back on his hands by the buyer, and then resold at a lower price, is not the rule of damages, although it may be considered, with other evidence, for the purpose of estimating the percentage of inferiority.

It is, therefore, decreed that the judgment of the district court be reversed, and it is further decreed that the plaintiff recover of the defendant the sum of three hundred and fifty-four dollars and seventy-four cents, with interest at the rate of five per cent per annum from the fifth of April, 1851, until paid, and costs

of the suit in the court below—those of the appeal to be paid by the plaintiff.

SALE BY SAMPLE—WARRANTY—LIABILITY OF VENDOR.—In *Mure v. Donnell*, 12 La. Ann. 369, a case closely resembling the principal case, the court held that whether cotton be falsely packed or mixed by carelessness or accident, if it be inferior to the samples by which it is sold, the vendee is entitled to relief, provided it be so packed that its defects can not be discovered on simple inspection. In the case of *Hall, Kemp & Co. v. Plassan*, 19 Id. 11, the court, in referring to the question of a sale by sample, stated that “it was a well-settled principle of law that a seller is bound to explain himself clearly as to the extent of his obligations; and the exhibition of a sample implies a warranty that the thing sold by it shall be in some measure in conformity to it. The sample is a tacit representation of the quality of the merchandise sold; and except where the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample.” The question will be found treated at considerable length by examining the following cases, and the notes to the same: *Bradford v. Manly*, 7 Am. Dec. 122; *Borrekins v. Bevan*, 23 Id. 85; *Beebee v. Robert*, 27 Id. 132; *Boorman v. Jenkins*, Id. 158; *Moses v. Mead*, 43 Id. 676; *Fisher v. Strickler*, 51 Id. 488; *Beirne v. Dord*, 55 Id. 321.

STATE v. FOSTER.

[8 LOUISIANA ANNUAL, 290.]

PLEA OF AUTREFOIS CONVICT IS SPECIAL PLEA IN BAR of the prosecution pending; and in order to plead the same with effect, the crime must be the same for which the defendant was previously convicted upon a sufficient indictment.

PROCLAMATION OF GOVERNOR OFFERING REWARD for the apprehension of a criminal is admissible as evidence to sustain an allegation in indictment charging that the accused had fled from justice.

IN CASES OF HOMICIDE, where the mortal stroke was given in Louisiana but the death occurred in Mississippi, the crime may be prosecuted in the parish where the mortal stroke was given.

MORTAL WOUND INFLICTED ON BOARD OF VESSEL in lake Borgne, which was moored to a wharf in the parish of St. Bernard: *held*, that the courts of the parish named had jurisdiction over the offender.

APPEAL from the first district of New Orleans. The facts are stated in the opinion.

Isaac E. Morse, attorney general, for the state.

Ducros, for the defendant.

By Court, BUCHANAN, J. The defendant was indicted in the parish of St. Bernard, for the murder of Clement Nicaise, alleged to have been committed on the fifth of November, 1850. He was found guilty of manslaughter, and, on appeal to this

court, the judgment was arrested, "without prejudice to a legal prosecution for the crime of manslaughter." See the decision of this court, delivered at the April term of 1852, not yet reported [7 La. Ann. 255].

In pursuance of this decree, an indictment for manslaughter was laid before the grand jury in St. Bernard, who found a true bill at the June term of 1852. A second conviction having ensued, the defendant again prosecutes an appeal before this tribunal, and prays that the judgment be arrested on the following grounds: 1. That the court below set aside the plea of *autrefois convict* on a mere motion, of which the accused was not even informed, and by an *ex parte* order; 2. That the proclamation of the governor was improperly admitted in evidence before the jury to prove the absconding of the defendant; 3. That the indictment does not describe the place of the death of Clement Nicaise with sufficient certainty, inasmuch as it says "he died on lake Borgne," without specifying in what state or jurisdiction he died; 4. That the court erred in refusing to charge the jury that if they found it proved that the mortal wound was inflicted in a schooner, on lake Borgne, they must acquit the prisoner.

1. Upon the first of these points the record shows that defendant pleaded to his indictment on the eighth of June, 1852, in writing. His plea was the general issue, to which, upon the same paper, was added a plea of *autrefois convict*, in the following words: "And the said William Foster further says, that, though not guilty, he has already been convicted for the same alleged offense, and sentenced to the penitentiary by this honorable court, in the last term of this court, and consequently he pleads *autrefois convict*, which he is ready to verify."

To this plea the district attorney demurred, as follows: "That to maintain the plea of *autrefois convict*, the crime must not only be the same for which the defendant was before convicted, but the conviction must have been lawful, and on a sufficient indictment. In the present case, the conviction was on an indictment clearly insufficient to sustain the verdict for manslaughter, more than a year having elapsed between the commission of the crime and the prosecution. The district attorney, therefore, demurs to said plea, alleging for cause of demurrer that the facts are insufficient in law to bar the present prosecution, and prays the judgment of the court, overruling and rejecting the plea of *autrefois convict*."

This demurrer appears to have been disposed of on the same

day that it was filed. The entry in the minutes is as follows: "On motion of the district attorney, it is ordered by the court that the plea of *autrefois convict* be set aside." This order is asserted to have been made *ex parte*, and in the absence of the defendant's counsel. But the contrary is to be inferred, from the fact that the entry in the record immediately preceding the sustaining of the demurrer, and in the same day's proceedings, is a motion of defendant's counsel to be allowed to amend his plea, which was granted. A demurrer to a plea admits the facts, and is to be decided by the court, and not by the jury; and we are satisfied that the plea was in this instance properly overruled. The plea of *autrefois convict* is a special plea in bar of the prosecution pending; and in order to plead the same with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful upon a sufficient indictment: 1 Ch. Crim. L. 461; *Rex v. Emden*, 9 East, 441.

But the judgment was arrested upon the previous conviction in this case precisely upon the ground that the indictment was insufficient to support a conviction for manslaughter, for want of the allegation that the accused had fled from justice, more than a year having elapsed from the commission of the offense to the finding of the bill of indictment.

2. Upon the second ground of error, we are of opinion that the proclamation of the governor was properly received in evidence, as a circumstance tending to sustain the allegation of this indictment, that defendant had fled from justice—an allegation necessary to justify a prosecution for manslaughter, under the circumstances.

3. The former decision of this court in this case, above mentioned, has passed upon the third of defendant's grounds of error, in express terms. In that decision it is said: "The common law, adopted by our act of 1805, was modified by the statute of Geo. II., which provides, that 'where the stroke has been given in England, and the death occurs out of England, or the reverse, the killing may be inquired of in that part of England where either the death or stroke shall happen respectively:' 1 East P. C. 365. And so the late court of errors and appeals in criminal cases held, in the case of *State v. McCoy*, 8 Rob. (La.) 545 [41 Am. Dec. 301]: 'That where the mortal stroke was given in this state, but the death occurred in the state of Mississippi, the crime might be prosecuted in the parish where the mortal stroke was given.'" It was proper, therefore, to charge

in the indictment the truth, that the death occurred on lake Borgne, and it was immaterial whether it occurred within the jurisdiction of Louisiana, Mississippi, or the high seas within the jurisdiction of the United States.

We entirely concur in the view taken of this point by our predecessors.

4. The fourth point of error assigned appears to us to involve a question of fact, and as such, to be excluded from our appellate jurisdiction in criminal cases by article 62 of the constitution. The indictment charges that the wound which caused the death of Clement Nicaise was inflicted in the parish of St. Bernard. From the appellant's bill of exceptions, it appears that the judge was requested to charge the jury that if they were of opinion from the evidence that the mortal wound was inflicted on Clement Nicaise while in a schooner on lake Borgne, where there is always water at the lowest tide, the accused must be acquitted. And for the purpose, apparently, of sustaining this bill of exceptions, a part of the cross-examination of one witness has been taken in writing by the request of defendant's counsel, and sent up with the record. The question of the territorial limits of the parish of St. Bernard is probably a question of law; but the question of the place where the mortal wound was given is undoubtedly a question of fact. We are of opinion that in the case supposed by the judge in the bill of exceptions, that although the wound was given on board a schooner on lake Borgne, yet the schooner, being moored to a wharf, was in the parish of St. Bernard, the judge did not err in refusing the charge. But whether or not the schooner was at such a point as described is a question of fact, into which we can not inquire.

It is therefore adjudged and decreed that the judgment of the district court be affirmed, with costs.

PLEA OF FORMER CONVICTION, WHEN AVAILABLE: See *McGinnis v. State*, 49 Am. Dec. 697; *Commonwealth v. McPike*, 50 Id. 727; *Sutcliffe v. State*, 51 Id. 459; *State v. Colvin*, 54 Id. 58.

HOMICIDE, INDICTMENT FOR, AND VENUE IN CASES OF.—Venue must be laid in the county wherein the offense was committed: *People v. Mather*, 21 Am. Dec. 122; *State v. McCoy*, 41 Id. 301; *People v. Adams*, 45 Id. 468. In the latter case it was held that a person shooting from one state and killing a man in another may be tried in the latter state.

NORTHERN BANK OF KENTUCKY v. SQUIRES.

[8 LOUISIANA ANNUAL, 318.]

COUNSEL SHOULD BE APPOINTED TO MAKE ABSENT CREDITORS PARTIES in cases of voluntary surrender.

ORDER OF COURT ACCEPTING SURRENDER OF INSOLVENT'S PROPERTY, and staying all proceedings against him, precludes creditors from instituting a suit in another court, when the order is authorized by the laws of this state.

STATE INSOLVENT OR BANKRUPT LAWS, as to contracts posterior to those laws, are valid and binding between citizens of the state where such laws exist, as to contracts made and to be performed in the state.

STATE, IN ITS SOVEREIGN CAPACITY, CAN EXERCISE FULLEST AUTHORITY OVER ITS OWN TRIBUNALS, and prohibit citizens of other states from suing in them on contracts made, either in or out of the state, unless restricted by some superior power.

DISCHARGE IN BANKRUPTCY GRANTED UNDER LAWS OF STATE, as between citizens of the state where the discharge is granted, and as to contracts made and to be executed there, is valid and binding everywhere.

BILL OF EXCHANGE DRAWN BY CITIZEN OF LOUISIANA, upon and accepted by citizens of Louisiana, and payable to the order of a citizen of the same state, will be understood as intended to be made payable in Louisiana, unless the contrary appears.

APPEAL from the third district court of New Orleans. The facts are stated in the opinion.

Bonford and Finney, for the plaintiff and appellant.

Sidney L. Johnson, for the defendants.

By Court, **OGDEN, J.** The defendant, a citizen of Louisiana, resists a suit instituted by the plaintiffs, citizens of Kentucky, to recover the amount of a draft accepted by a commercial firm of which he was a member, on a plea in the following words: "That since the execution and protest of said draft, to wit, some time in the year 1850, defendant made a cession of all his property to his creditors, under the provisions of the act of February 20, 1817, relative to the voluntary surrender of property, and of the acts amendatory thereof, and of the civil code of Louisiana, to which proceedings the plaintiffs were made parties, under the provisions of said laws; that a stay of all proceedings against the person and property of defendant was granted by order of the fifth district court of New Orleans, before which said cession was made, and that said order has never been set aside." The present suit is alleged to be in violation of that order and of the law under which the contract sued on was made. The bill is dated at New Orleans, drawn by L. Janin, a

citizen of Louisiana, on Laforest & Squires, at New Orleans, and made payable to the order of Benjamin Winchester, and has on it the blank indorsements of Benjamin Winchester and Miles Taylor. The parties whose names are to the bill were all citizens of Louisiana at the time, and the acceptors were commission merchants residing and doing business in New Orleans. The bill was accepted and indorsed for the accommodation of the drawer, precisely in the shape in which it appears now in the record. Logan Hunton, also a citizen of Louisiana, became the owner of it, and sent it to Kentucky, where it was bought by the plaintiffs. The name of Hunton is not on the bill.

The case has been argued with much zeal and ability on the question of the effect and validity of the insolvent laws of the state, and the judicial proceedings which have taken place under them, as affecting the right of the plaintiffs, citizens of another state, under the circumstances of this case, to prosecute this suit in a court of this state, notwithstanding the order staying all proceedings against the person and property of the defendant. A question, however, has been raised in this court which does not seem to have been considered in the court below, and which it is necessary first to dispose of. It is denied that the plaintiffs were duly made parties to the proceedings in bankruptcy instituted by the defendant. This was undoubtedly essential to give validity to the plea which has been set up. The bill is found in the schedule of defendant's liabilities, and the holder of it is represented to be A. S. Trotter, agent of the Northern Bank of Kentucky. Trotter is not represented as either being present or residing in New Orleans, and the personal service on him, which the plaintiffs contend should have been shown, we think was not necessary. Counsel was appointed to represent the absent creditors, and that is the only formality required by law to make absent creditors parties in cases of voluntary surrenders: Acts of 1817, p. 130. The bill was then in suit in the United States court in New Orleans, in the name of the present plaintiffs, and in the description a special reference was made to that suit. The plaintiffs were, therefore, legally parties to the proceedings, and we will now proceed to consider the argument and authorities which have been submitted to us on the merits of the plea.

The order of the court, made under the authority of a sovereign state, accepting the surrender of defendant's property and staying all proceedings against him, must preclude any creditor from instituting a suit in a court of this state, unless

the law itself is a nullity. The argument of the counsel for plaintiffs is not understood as contending for the absolute nullity of the law, for it seems to be conceded everywhere to be now well settled that state insolvent or bankrupt laws, as to contracts posterior to those laws, are valid and binding between citizens of the state where such laws exist as to contracts made and to be performed in the state. But the state, in its sovereign capacity, can exercise the fullest authority over its own tribunals, and prohibit citizens of other states from suing in them on contracts made either in or out of the state, unless there is some superior power by which her authority in this respect is circumscribed. The state has declared her will on this subject. Her insolvent laws expressly extend their operation to all persons, whether citizens of other states or foreigners; and all contracts are declared to be affected by them, whether made in or out of the state, or to be performed in or out of the state. The plaintiffs claim an exemption from the operation of this law as regards them, which they can only be entitled to by showing either that the whole law is repugnant to the constitution of the United States, and therefore void, or that by the effect of some clause in the constitution, so much of the law as prohibits them from suing in the courts of the state is inoperative. The right of the several states to pass bankrupt laws so long as congress refrained from exercising the power given to them by the constitution, of passing uniform bankrupt laws, has never been questioned since the decision in the case of *Sturges v. Crowninshield*, 4 Wheat. 122. It was there held that the states might pass bankrupt laws, provided they did not violate the tenth section of the first article of the constitution of the United States, which declares that no state shall pass a law impairing the obligation of contracts. Judge Marshall, in delivering the opinion of the court in that case, says the constitution did not grant to the states the power of passing bankrupt laws, it found them in possession of that power, and restrained them so far as to prevent them from passing laws impairing the obligation of contracts. He also declares, in that opinion, that the insolvent laws existing in the different states at the adoption of the constitution, which went further than discharging the person from imprisonment, were obnoxious to the constitutional prohibition. According to the opinion expressed in that case, the insolvent laws of this state would be repugnant to the constitution of the United States, and would be void, as well in regard to our own citizens as in regard to the citizens of other

states. It is, however, well known that the whole subject of the constitutionality and effect of state bankrupt laws came afterwards under review in the leading case of *Ogden v. Saunders*, 12 Id. 213, and that it was then decided by the court that a discharge under a state law, when the contract was made between citizens of the state under whose law the discharge was obtained, should be held to be valid. In regard to citizens of other states, the court says: "But when the state passes beyond its own limits and acts upon the rights of the citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States." Judge Marshall, who had delivered the opinion of the court in the case of *Sturges v. Crowninshield*, *supra*, assented to this judgment, and the constitutionality and validity of state bankrupt laws in its effects on posterior contracts to the extent of even entirely discharging the obligation, was established by that decision.

The case of *Ogden v. Saunders*, *supra*, presented the question whether Ogden, who had obtained a discharge in New York under the insolvent laws, could successfully plead that discharge in bar of a suit instituted against him in the United States court at New Orleans, by Saunders, on a bill drawn by Jourdan, at Lexington, in Kentucky, on Ogden, then a citizen and resident of New York, and there accepted by him. The court held that the fair and ordinary exercise, by the states, of the power to pass bankrupt laws did not necessarily involve a violation of the obligation of contracts, but that the exercise of that power, as regarded the rights of Saunders, a citizen of a different state from the one under whose laws the discharge had been granted, was incompatible with the rights of other states—and held the discharge set up to be invalid. From the language made use of in the propositions, as above stated by the court, it would seem that they considered the rights of the state to pass such laws as only circumscribed in so much as by the constitution of the United States the federal courts were clothed with the power of deciding controversies between citizens of different states. In the previous case of *Sturges v. Crowninshield*, *supra*, where the same law of New York was held to be unconstitutional, and where the contract was in fact made prior to the law granting the discharge, Judge Marshall had deemed it proper to say that the opinion was confined to a case in which a creditor sues in a court, the

proceedings of which the legislature, whose act is pleaded, had not a right to control; thereby strongly intimating the opinion that the legislature of the state would necessarily exercise an absolute control, so far as concerned the courts of the state. It is principally on the reasoning adopted by the court in the case of *Ogden v. Saunders*, *supra*, and on the authority of the case of *Boyle v. Zacharie*, 6 Pet. 635, together with a decision of Judge Woodbury, in the circuit court of the United States, and numerous decisions of state courts, that the plaintiffs' counsel have based their argument to contend that defendant is amenable before our own courts at the suit of citizens of another state. We have examined the cases referred to, and particularly the case of *Towne v. Smith*, 1 Woodb. & M. 118, in which Judge Woodbury has reviewed, at great length, all the decisions on that subject. The result of that examination is, we think it to be settled by judicial authority—1. That the insolvent or bankrupt laws of a state, if not suspended by the enactment of a uniform bankrupt law by congress, are constitutional and valid as to all posterior contracts entered into between citizens of the state where such laws exist, and equally so whether they affect the obligation or the remedy only; 2. That a discharge granted under such laws, as between citizens of the state where the discharge is granted, and as to contracts made and to be executed there, is valid and binding everywhere; 3. That it is only in regard to contracts made between citizens of different states, and not stipulated to be performed in the state where the discharge is granted, that the validity of such discharge can be questioned, if at all, in the courts of the state where it was granted, although in the courts of the circuits of the United States, according to their existing jurisprudence, a discharge, under those circumstances, would not be held good as a plea in bar.

The two first propositions are established by all the authorities, and their correctness now can scarcely be questioned. The third proposition is the one which directly involves the right of the plaintiffs to maintain this action. Their counsel contend that their case is not embraced by it, that the contract sued on was made between a citizen of Louisiana and citizens of Kentucky, and that as no place of performance is indicated in the contract, Louisiana can not be considered as the place where it was to be performed. They deny, however, the correctness of the legal proposition itself, and say it is immaterial whether the con-

tract was made directly with the citizen of another state or not, and that it would make no difference even if Louisiana was to be considered as the place of performance; and they contend that, although this suit could not be entertained in the federal court for the reason that their title to the bill, as shown on its face, is traced through an immediate indorsee, residing in the same state with the maker, yet they are entitled, under the facts and law of the case, to maintain their action in the state tribunals. The first branch of the proposition, which is denied by them, viz., that it is only in regard to contracts between citizens of different states that the validity of a discharge, under a state insolvent law, can be questioned, appears to us to be fully established in the case of *Ogden v. Saunders*, *supra*. The case of *Braynard v. Marshall*, 8 Pick. 194, in which it was held that if a note had either been given to a person belonging to another state, or had been indorsed to one before the discharge issued, the discharge would be no bar when the contract was sued on in the courts of another state from that in which the discharge is granted, is not applicable in principle to this case, and if it was, does not appear to be consistent with the doctrine laid down in the case of *Ogden v. Saunders*, *supra*. Judge Story, who was one of the judges who decided that case, has expressed his opinion to that effect: Story on Bills of Exch., secs. 166-169. The second branch of the proposition, viz., that when even the contract is made directly with a citizen of another state, if it is stipulated to be performed within the state where the contract is made, and where the discharge is granted, it is not obnoxious to the constitutional prohibition against a state's passing laws impairing the obligation of contracts, is fairly deducible from the reasoning of Judge Story in the case of *Boyle v. Zacharie*, 4 Pet. 444. In that case, Zacharie & Turner, having obtained a judgment in the United States district court at New Orleans against Boyle, who was a citizen of Maryland, for money advanced by them on account of Boyle, in New Orleans, and which Boyle assumed to pay them, proceeded to execute their judgment, and were enjoined by a bill in equity in the circuit court of Maryland, on the ground that Boyle had obtained a discharge under the insolvent act of Maryland. The court considered the constitutionality of the state insolvent law as settled by the decision in the case of *Ogden v. Saunders*, *supra*, but it was contended that the contract upon which the judgment was founded was, in contemplation of law, a Maryland contract, and not a Louisiana contract, and was, therefore, discharged under the insolvent act of Maryland. Judge Story

answered the objection by showing that the contract, on the part of Boyle, was to pay Zacharie & Turner for advances made by them for him in New Orleans, and that the payment, unless otherwise stipulated, would also be understood to be made in New Orleans. He therefore treated the contract as a Louisiana contract, and not as a Maryland contract. It therefore must have been considered by the court that if Maryland had been the place of performance of the contract by the agreement of the parties, the contract would have been a Maryland contract, and discharged under the insolvent laws. And that view is entirely consonant with the reasoning of the court by which, in the case of *Ogden v. Saunders*, *supra*, they came to a conclusion in favor of the constitutionality of the state bankrupt laws. In the present case, we are of opinion that the contract sued on was a Louisiana contract. It was executed in Louisiana, was made between citizens of Louisiana, and not being otherwise stipulated, the payments would be understood as intended to be made in Louisiana. We have considered the case as if a discharge had been granted to the defendant by his creditors, because, although a discharge has not been granted, it has been contended that the stay of proceedings granted to the defendant, and the exemption of his future acquisitions to a certain extent from the pursuit of his creditors, which is the consequence flowing from the *cessio bonorum*, does itself materially impair the obligation, and that such is the effect practically, there can be little doubt. We are of opinion, however, that, according to the principles now settled by the highest authority, the validity and effect of our state insolvent laws, and of the judicial proceedings under them, which are pleaded by the defendant, can not be denied in the courts of our state under the circumstances of this case. It is not necessary to decide whether we could properly, under any circumstances, nullify the laws of the state so far as they only deny a remedy in our courts to the citizens of other states, by placing them in the same situation with our own citizens. We are not able to see how such laws could be considered as impairing the obligation of contracts entered into between our citizens and the citizens of other states, particularly as the constitution of the United States has provided tribunals under its own authority for the enforcement of such contracts.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be affirmed with costs.

SLIDELL, C. J. I consider the general rule well settled, that state insolvent laws, discharging the obligations of future con-

tracts, are constitutional. It seems to me equally clear that the defendant in this case is protected by our state law. A resident and citizen of Louisiana, he accepted, at New Orleans, a bill drawn here by a citizen of this state in favor of and indorsed by a citizen of this state, and negotiated here to a citizen of this state, who afterwards transferred it to the plaintiffs, residents of Kentucky. Not only was the acceptance made here, but the reasonable expectation of all parties must have been that it was to be paid here, where the acceptor lived, and was established as a merchant. I can not understand by what right this transferee of a Louisiana creditor can ask a court of Louisiana to disregard its own insolvent laws, and violate a *cessio bonorum* and a stay of proceeding regularly adjudged in a court of Louisiana. Such a doctrine, it seems to me, would involve principles subversive of state sovereignty, and for which I find no sufficient warrant in the constitution of the United States.

I have, therefore, no hesitation in concurring in the affirmance of the decree.

EFFECT OF DISCHARGE UNDER STATE INSOLVENCY LAW.—In the case of *Scott v. Bogart*, 14 La. Ann. 261, a case somewhat resembling the principal case, a majority of the court held that a *cessio bonorum* was not a peremptory bar to a suit upon a judgment rendered contradictorily with the ceding debtor in another state after the cession had been accepted here, even though the debt upon which the foreign judgment was obtained was put upon the debtor's bilan. In *Larrabee v. Talbot*, 46 Am. Dec. 637, the court held that a discharge under a state insolvent law did not affect persons residing nor contracts to be performed beyond the limits of the state. See also the cases cited in the note to that case and *Reed v. Vaughan*, 55 Id. 133.

CONSTITUTIONALITY OF STATE INSOLVENT LAWS: See *Reed v. Vaughan*, 55 Am. Dec. 133.

MYERS v. MYERS.

[8 LOUISIANA ANNUAL, 309.]

WHERE POSSESSION OF PROPERTY IN ONE STATE HAS COMMENCED BY FORCE or fraud, practiced within the limits and jurisdiction of a sister state, and contrary to the authority and judicial process of the same, such property must be returned to the state whence it was taken, and the parties remitted to that jurisdiction for a determination of their rights.

PLAINTIFF'S CONSENTING TO RELEASE SHERIFF FROM ANY LIABILITY resulting from his leaving slaves, when attached, in the possession of one to whom the debtor had hired them, and in whose employment there is a keeper appointed by the sheriff, does not invalidate the seizure, although the sheriff's responsibility be diminished.

APPEAL from the fourth district court of New Orleans. Claiborne Myers, plaintiff, David Myers, defendant, John L. Henley, third opponent. The facts are stated in the opinion.

Bonford and Finney, and Chilton, for the plaintiff and appellant.

Goold, for the opponent.

By Court, OGDEN, J. The third opponent, who is the sheriff of Harrison county, Mississippi, claims the custody and possession of twenty-three slaves who were seized and put in possession of the sheriff of the parish of Rapides, by virtue of a writ of *fieri facias*, from the fourth district court of New Orleans, in the suit of *Claiborne Myers v. David Myers*. He alleges that on the twenty-fifth of December, 1851, the said slaves were lawfully in his possession, as sheriff, in the state of Mississippi, by virtue of a writ of attachment from the circuit court of Harrison county, in a suit of *Samuel F. Butterworth v. David Myers*; that the said David Myers, on or about that time, forcibly and feloniously took said slaves out of his possession and carried them to the parish of Rapides, where, by collusion between himself and his brother, Claiborne Myers, the plaintiff in this suit, the said David Myers caused the slaves to be seized in satisfaction of the judgment obtained against him by his brother. Claiborne Myers, in his answer, denies generally the allegations in the opposition, and specially that the opponent ever had custody of the slaves in his capacity of sheriff. He sets forth that he had obtained a judgment, in November, 1847, against David Myers, which had been duly recorded in the parish of Orleans, the place of residence of David Myers, and had thereby acquired a judicial mortgage on these slaves, who were then in the state of Louisiana. He further alleges that the existence of this judicial mortgage was well known to Butterworth, and that, in order to defeat it, he, Butterworth, had caused the slaves to be carried into the state of Mississippi, in order to subject them to his pretended claim. By a peremptory exception, subsequently filed, he relies on two additional grounds of defense: one, that if the opponent, or sheriff, had ever levied on the negroes by process of attachment, he had abandoned and released the possession immediately after the levy was made; the other, that the attachment, under which the sheriff claimed the right had been quashed and the suit dismissed, by a final judgment between Butterworth and David Myers.

The view we have taken of the law which ought to govern

the case renders it unnecessary to notice many of the points raised on the argument, and a great deal of testimony applicable only to those points. We consider the only questions to be—1. Whether the slaves were lawfully in the custody of the opponent, as sheriff, in the state of Mississippi; 2. Whether they were forcibly and feloniously taken out of his possession and brought to this state.

Claiborne Myers may be entitled to the judicial mortgage on the negroes, which he asserts; and Butterworth may have resorted to improper means to defeat the mortgage by causing the negroes to be conveyed into the state of Mississippi. On the other hand, the judgment of Claiborne Myers against his brother, David Myers, may be collusive and simulated, and designed to protect the property from the pursuit of Butterworth; all of which the parties reciprocally charge to be true. We express no opinion on those questions, considering them foreign to the issue. Nor do we even think it necessary to decide the question, so much argued at bar, as to the effect of the judgment in Mississippi dissolving the attachment and dismissing Butterworth's suit. It may result, by virtue of that judgment, that the negroes will be restored to the defendant in Mississippi, or it may be that, by effect of a writ of error, with a *supersedeas*, either already or hereafter to be obtained, the possession of the negroes will be continued in the sheriff. These questions we do not feel ourselves called on to decide.

If the possession of the parties in Louisiana has commenced by force or fraud, practiced within the limits and jurisdiction of a sister state, and in opposition to the authority and judicial process of her courts, we hold the rule stern and inflexible, that such possession must terminate as soon as appeal is made to our laws; that the property must be returned to the state from which it was thus taken, and the parties remitted to that jurisdiction to settle their rights. This doctrine has been repeatedly recognized in our state: See cases, *Powell v. McKee*, 4 La. Ann. 108; *Vingate v. Wheat*, 6 Id. 241, and *Paradise v. Farmers' and Merchants' Bank*, 5 Id. 711. The fact that the property was clandestinely taken by David Myers out of the possession of Baylor, who was appointed keeper by the sheriff, is fully established, and it is shown that force would have been resorted to, if it had become necessary, to accomplish the object. The case is, therefore, reduced to the single question, whether the negroes were lawfully in the custody of the opponent as sheriff at the time they were thus removed.

It is contended—1. That the sheriff was never in possession of the negroes under the writ of attachment, because, before the seizure, he was authorized by the plaintiff in the writ to leave the negroes in the possession of Kendall, to whom they were then hired; 2. That according to the statute of Mississippi, it was necessary the sheriff should have held possession of the negroes, either by himself or by a deputy, to be appointed in writing and with certain formalities prescribed in the statute. It appears that Baylor, the keeper appointed by the sheriff, was in the employment of W. G. Kendall, to whom David Myers had hired the negroes. The written agreement or consent of Butterworth, the plaintiff in the attachment, to release the sheriff from any liability resulting from his leaving the negroes, when attached, in the possession of Kendall, did not affect the seizure by the sheriff, which appears, as well by his return as by the evidence, to have been made with all the formalities prescribed by law. The sheriff's responsibility to Butterworth has only thereby diminished. The statute of Mississippi relating to the appointment of deputies has no application. The sheriff could as well have retained possession by a keeper or overseer, for whose acts he was responsible, as by his deputies. It was made his duty by law to provide for the sustenance and support of the negroes until they were sold or legally discharged from the attachment; and this he was to do on his own responsibility as to the means to be employed. In the performance of that duty, for his own safety he might deem it necessary to incarcerate the negroes; but it would be a barbarous provision of law to require him to do so, in order to render the seizure a legal one. The legal seizure and custody of the negroes, under the attachment in Mississippi, was in every respect complete, and the plaintiff, Claiborne Myers, whatever his rights may be, can not avail himself of the clandestine removal of the negroes to this state by his brother, David Myers, to defeat the attachment in Mississippi.

It is therefore ordered that the judgment of the court below be affirmed, with costs.

JURISDICTION AS DEPENDENT ON SOVEREIGNTY OF STATES. — In suits *in rem* the *locus rei sitæ* gives the jurisdiction, for it is only in the courts of that country that a *jus in re* can be directly enforced: *The Ada*, Dav. 407. Where all the facts of a case transpired while the parties were residents of another state, their rights must be ascertained according to the laws of that state: *Sallee v. Chandler*, 26 Mo. 124. Comity does not require a court to sacrifice the rights of defendants, citizens of its own state, merely to protect parties against the consequences of their own acts under the laws of another state:

Woodward v. Roane, 23 Ark. 523. When a party commences a suit in one state and then commences a suit for the same cause in another state, and ceases to take testimony in the former and proceeds to take testimony in the latter case, the courts of the former state can only restrain him from proceeding in the first case: *Hammond v. Baker*, 3 Sandf. 704. The courts of Georgia have no extraterritorial jurisdiction, and can not make the citizens of foreign states amenable to their processes, or conclude them by a judgment *in personam* without their consent: *Adams v. Lama*, 8 Ga. 83. The following cases involving criminal law show what the general rule is. The penal laws of a country do not reach in their effects beyond the jurisdiction where they are established: *Commonwealth v. Green*, 17 Mass. 515. An accessory before the fact in one state to a felony committed in another state is guilty of a crime in the state where he became accessory, and punishable there; the principal being indictable in the state where the felony was committed: *State v. Chapin*, 17 Ark. 561. In a case determined in Kentucky it was held that an action of trespass might be brought there for an assault and battery committed in Indiana territory: *Watts v. Thomas*, 2 Bibb, 458; but see *Adams v. People*, 1 N. Y. 173. By the common law crimes and misdemeanors are cognizable and punishable exclusively within the jurisdiction where they are committed: *Commonwealth v. Kunzmann*, 41 Pa. St. 429. In *Ewer v. Coffin*, 43 Am. Dec. 587, the court held that state courts were limited in jurisdiction to state lines; see note citing other cases. In a South Carolina case, where the offender was forcibly carried into the state against the laws of which the offense was committed, the court held that he was within the jurisdiction: *State v. Smith*, 1 Bailey, 283. In a Wisconsin case it was held that a state could pass laws in regard to its own citizens which would be binding and obligatory on them when they are without its territorial limits, and for the violation of which they could be punished in its own courts, whenever the state could find them within its jurisdiction: *Chandler v. Main*, 16 Wis. 398. State courts may exercise jurisdiction in cases authorized by the laws of the state and not prohibited by the exclusive jurisdiction of the federal courts: *Bruen v. Ogden*, 11 N. J. L. 370.

JURISDICTION—EFFECT OF COUNTY DIVISIONS.—The state courts have jurisdiction of offenses committed on arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when those places are within the body of the county; and in such cases the circuit courts of the United States have no jurisdiction: *United States v. Grush*, 5 Mass. 290; *Commonwealth v. Peters*, 12 Met. 387; *People v. Wilson*, 3 Park. Cr. 199. In an Iowa case, where the question of jurisdiction arose under the statute, which provided that where a person committed an offense on board a vessel or float he might be indicted in any county through any part of which the vessel or float may have passed on that trip or voyage, the court held that it was not confined to that part of the voyage performed where the offense was committed, but extended to the entire trip: *Nash v. State*, 2 G. Greene, 286. In Mississippi, by special statute, a person who inflicts a blow in one county, from the effects of which blow the person injured dies in another county, is indictable in the county where the person dies: *Sloughton v. State*, 21 Miss. 255; see also *State v. Foster*, ante, p. 678. The question of jurisdiction will be found treated at length in several cases in this series, as well as in the notes thereto, where most of the cases on this subject will be found to be mentioned. As to the question of jurisdiction of United States courts, see *St. Albans v. Bush*, 23 Am. Dec. 246; *Thoms v. Southard*, 26 Id. 467; *Lowry v. Erwin*, 39 Id. 556; *Vose v. Morton*, 50 Id. 750; *Reed v. Vaughan*, 55 Id. 133; of

state courts over torts committed on high seas: *Wilson v. Mackenzie*, 42 Id. 51; of state courts over causes arising under the constitution of the United States: *Commonwealth v. Fuller*, 41 Id. 509; *Wilson v. Mackenzie*, *supra*; *Teall v. Felton*, 49 Id. 352; whether chancery can extend its jurisdiction over a citizen of another state by a rule of practice as to service of process: *Dearing v. Bank of Charleston*, 48 Id. 300; *McVicker v. Beedy*, 50 Id. 686; of state courts over an act committed in one state causing injury in another: *Thayer v. Brooks*, 49 Id. 474. Judgment without jurisdiction of person against whom it was rendered is a nullity: *Flint River Steamboat Co. v. Foster*, 48 Id. 248; *Dearing v. Bank of Charleston*, Id. 300; see also the following cases: *Morley v. Green*, 42 Id. 112; *Merrill v. Lake*, 47 Id. 377; *Green v. Creighton*, 48 Id. 744; *McGowin v. Remington*, 51 Id. 584; *People v. Turner*, 52 Id. 295; *Oakley v. Hibberd*, Id. 139; *Eslava v. Lapretre*, 56 Id. 266; *Harrison v. Harrison*, Id. 227; *Muldrow v. Norris*, Id. 313.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

STATE v. THURSTIN.

[35 MAINE, 205.]

INDICTMENT SHOULD ALLEGE EVERY MATERIAL FACT that serves to constitute the offense charged, with precision and certainty as to time and place.

GENERAL AVERMENT IN INDICTMENT THAT ACCUSED HAD COMMITTED PARTICULAR CRIME NAMED, without more specific allegations, would be insufficient.

INDICTMENT HAVING ONCE STATED TIME WITH CERTAINTY MAY REFER TO IT, in respect to other facts alleged, by the terms "then" and "there," without repeating it.

IN CRIMINAL PLEADING NOTHING CAN BE TAKEN BY INTENDMENT.

INDICTMENT CHARGING ADULTERY WITH CERTAIN NAMED WOMAN, but averring no time to the fact that she was a married woman, and not referring it to certain time before stated by the words "then" and "there," or any equivalent terms, is insufficient.

ALLEGATION IN INDICTMENT, "BEING A MARRIED WOMAN AND THE LAWFUL WIFE OF A.," has reference to the time of finding the indictment, and not to the time of the offense in strictness of criminal law.

INDICTMENT FOR ADULTERY IS INSUFFICIENT AS NOT ALLEGING WOMAN TO BE MARRIED at the time of the alleged committal of the offense, if it charges that the defendant, on the twenty-fifth of March, 1851, committed adultery with B., she, the said B., "being a married woman and the lawful wife" of A.

INDICTMENT for the crime of adultery was found at the October term of 1852. It alleged that the defendant, at Avon, "on the twenty-fifth day of March, 1851, did commit the crime of adultery with one Emeline Whitehouse, the wife of one Solomon H. Whitehouse, she, the said Emeline Whitehouse, being a married woman, and the lawful wife of him the said Solomon

H. Whitehouse." The defendant's counsel objected, at the opening of the case, to the sufficiency of the indictment. The question was submitted to this court for determination.

Evans, attorney general, for the state.

May, for the defendant.

By Court, HOWARD, J. Every material fact which serves to constitute the offense charged should be alleged and set forth in the indictment, with precision and certainty as to time and place. A general averment that the accused had committed a particular crime named, without more specific allegations, would be insufficient. But after the time has been stated with certainty, it may be referred to, in respect to other facts alleged, by the terms "then" and "there," without being repeated: 2 Hale P. C. 178; 2 Hawk. P. C., c. 25, sec. 78, and c. 23, sec. 88; 1 East P. C. 346; 1 Ch. Crim. L. 181, 182.

In this case, the fact of committing the crime of adultery, at a certain time and place, with Emeline Whitehouse, is first alleged against the accused; but to the fact that she was a married woman, and the wife of another, no time is averred, nor is there a reference, to the certain time before stated, by the words "then" and "there," or any equivalent terms. Although we can readily suppose what was intended by the averments, yet in criminal pleading nothing can be taken by intendment. The allegation, "being a married woman, and the lawful wife of Solomon H. Whitehouse," has reference to the time of finding the indictment, and not to the time of the offense, in strictness of criminal law: *Bridge's Case*, Cro. Jac. 639; *Rex v. Ward*, 2 Ld. Raym. 1467; 2 Ch. Crim. L. 181. The indictment is, therefore, insufficient.

SHEPLEY, C. J., and TENNEY, WELLS, and APPLETON, JJ., concurred.

TIME AND PLACE IN INDICTMENT SHOULD BE ALLEGED TO EVERY MATERIAL FACT: See *Nicholson v. State*, 54 Am. Dec. 168; *State v. Dayton*, 53 Id. 270. Alleging an impossible or future date is fatal: *State v. Ray*, 33 Id. 90, and note citing prior cases.

DESCRIPTION OF OFFENSE IN INDICTMENT.—The indictment must state the charge with as much certainty as the circumstances of the case will permit, but nothing more is required: *Commonwealth v. Webster*, 52 Am. Dec. 711, with note citing cases upon the description in the indictment of the mode in which a murder was committed. An imperfect description of the offense is not aided by introductory matter, by qualifying epithets, nor by the alleged consequences of the act: *Commonwealth v. Hunt*, 38 Id. 346. But the certainty is only the same certainty as that requisite in declarations, that is, certainty to a common intent in general: *Sherban v. Commonwealth*, 34 Id. 460, and note citing other cases.

INDICTMENT FOR ADULTERY.—Describing the woman with whom the act is committed by another name is not sufficient to show that she is not the prisoner's wife. This fact the indictment must show: *Moore v. Commonwealth*, 39 Am. Dec. 724.

MARSHALL v. MITCHELL.

[35 MAINE, 221.]

INDORSER IS LIABLE WITHOUT DEMAND AND NOTICE, IF HE HAS SECURITY in his hands fully equal to his liability, whether the security is taken before or after negotiation.

PAYEE OF NOTE AFTER INDORSING IT WAIVES DEMAND AND NOTICE by agreeing with the maker, before its maturity, to take up and pay the note.

PAYEE OF NOTE WAIVES DEMAND AND NOTICE FROM INDORSEE by agreeing with the maker before the maturity of the note to take back the consideration of the note and to pay it, though the agreement be unexecuted.

ASSUMPSIT on a promissory note. The defendant sold to one Merrow a shop, taking two notes from the latter in payment of the purchase price. He indorsed in blank and negotiated both these notes, and this action is upon one of the indorsements. The sale of the shop was afterwards rescinded, the defendant agreeing to take it back and to pay the notes. By this agreement the plaintiff contended that Mitchell waived demand and notice. The defense was, that Mitchell agreed with Merrill to sell the shop to one Lawton and to pay the note involved in this action with the proceeds of that sale, but that Lawton did not take or pay for the shop, which was shortly afterwards destroyed by fire, while still in the possession of Merrow. The jury were instructed that the agreement, if proved, would be a waiver of notice, and to this instruction, the verdict being for the plaintiff, the defendant excepted.

Evans, for the defendant.

H. W. Paine, for the plaintiff.

By Court, **WELLS, J.** The object and purpose of notice to an indorser is, that he may take measures to indemnify himself when a fruitless demand has been made upon the maker. If the indorser has security in his own hands fully equal to his liability, he can suffer no loss by the want of demand and notice, and therefore he has been held liable in such case, without proof of those facts: *Mead v. Small*, 2 Greenl. 207 [11 Am. Dec. 62]; *Corney v. Da Costa*, 1 Esp. 301; 3 Kent's Com. 113. And

if the security is taken before the maturity of the note, it can not be material whether it was before or after its negotiation. In either case it furnishes an indemnity.

No instruction to the jury was requested upon the effect to be given to the loss of the security. Nor does it become necessary to decide upon the duty of the defendant in relation to it, for the case is not submitted for decision upon the facts, but upon the legal questions raised.

It is contended that the agreement on the part of the defendant with Merrow, the maker of the notes, to take back the shop, which was the consideration for them, and take up the notes, could have no effect unless it was executed. But that part of the agreement which relates to taking up the notes would induce Merrow to refrain from making any preparation to pay them, and he would not expect a demand of payment to be made on him. It was equivalent to saying to him, that he need not pay the notes, but they should be paid by the defendant. And in case they were to be paid by the defendant, there could be no necessity for the plaintiff to call on the maker, or to give notice to the defendant.

A promise at the time a note is negotiated to take it up if not paid by another party has been held a waiver of notice: *Boyd v. Cleveland*, 4 Pick. 525.

The promise of the defendant several months before the note was due, made to the maker, that he would take it up, was a fact of which the plaintiff had a right to avail himself. He could safely repose upon such promise, although not made to himself, with the expectation it would be performed, and forbear to do those acts which, if the defendant's promise were fulfilled, would be rendered entirely unnecessary. It is not for the defendant to say, after he has made the promise, that the plaintiff should not have relied upon it. Any holder of the note might justly infer from such promise a waiver of demand and notice. When the indorser says to the maker he will pay the note, it is a declaration that the other parties need not give themselves any trouble in relation to it. This language would justify their inaction. It excuses a call upon the maker to do what the indorser himself has agreed to perform, and as he has taken upon himself to act for the maker, he would know whether the action had been completed.

It is not necessary to determine whether the agreement to take back the shop would be valid if unexecuted, as that to take

up the notes is sufficient to authorize a jury in finding a waiver of demand and notice: *Andrews v. Boyd*, 3 Met. 434.

Exceptions overruled.

SHEPLEY, C. J., and HOWARD and HATHAWAY, JJ., concurred.

WAIVER OF DEMAND AND NOTICE BY TAKING SECURITY: See *Kramer v. Sandford*, 39 Am. Dec. 92, and extensive note 95; *Stephenson v. Primrose*, 33 Id. 281; *Perry v. Green*, 38 Id. 536; *Willis v. Green*, 40 Id. 351, and notes citing prior cases.

THE PRINCIPAL CASE IS CITED in *Hale v. Danforth*, 46 Wis. 556, to the point that "when an arrangement with the maker is entered into by an indorser by which he is to take up the note, it is a sufficient waiver of notice of non-payment." In *Pugh v. McCormick*, 14 Wall. 375, it is authority for the proposition that satisfactory proof of waiver of demand and notice is in all respects equivalent in law to a compliance with the requirement.

WOODWARD v. ABORN.

[35 MAINE, 271.]

ONE IS LIABLE FOR PLACING OR NEGLIGENTLY ALLOWING DELETERIOUS SUBSTANCE TO REMAIN in a place where damage accrues therefrom to another, either by the ordinary or extraordinary, and yet not very uncommon, action of the elements.

ONE IS LIABLE FOR DAMAGE CAUSED TO WATERS OF ANOTHER'S WELL by the action of an extraordinary rain upon manure which he has negligently left near the well.

CASE to recover damages caused to the waters of the plaintiff's well from the act of the defendant in negligently placing and keeping for a week a pile of manure near the well. The parties were owners of adjoining lands, and the division line ran near the well. The defendant's servant attempted to draw a load of manure to the rear of the plaintiff's garden, but not being able to draw it so far, deposited the load near the well, where it was left for about a week. The plaintiff notified the defendant upon the next day after the depositing of the load that it was injuring the well-water. Some two or three days after, it rained with extraordinary power, and the rain, after soaking through the manure, came into the well and rendered the water unfit for use. The defendant contended that if the injury resulted merely from the action of the extraordinary rain upon the manure he was not liable, and asked an instruction to that effect. The instruction was refused, and the verdict being for the plaintiff, the defendant excepted.

Vose, for the plaintiff.

Lancaster and Baker, for the defendant.

By Court, SHEPLEY, C. J. The principal cause of complaint insisted upon is the refusal to instruct the jury "that if the plaintiff's well would not have received any injury from the manure lying there but for the extraordinary rain that fell, the plaintiff's action could not be maintained."

This request assumes that if the waters of the well would not have been injured without such a rain, and that they were injured by such a rain, by reason of the negligence of the defendant, there could be no legal cause of action.

A person should not place or negligently allow a deleterious substance to remain where the useful waters of another may be corrupted either by the ordinary or extraordinary, and yet not very uncommon, action of the elements.

Exceptions overruled.

WELLS, HOWARD, and HATHAWAY, JJ., concurred.

STABLE MAY BECOME NUISANCE BY BEING NEGLIGENTLY KEPT: See *Dargan v. Waddill*, 49 Am. Dec. 421, and cases cited.

NO LIABILITY FOR ACT OF GOD.—The owner is not liable for injuries caused by the bursting of a dam occasioned by a storm or flood, if he exhibited no negligence in the construction of the dam: *Lehigh B. Co. v. Lehigh C. & N. Co.*, 26 Am. Dec. 111; and see note on responsibility for accident, *Vincent v. Stinehour*, 29 Id. 149.

THE PRINCIPAL CASE IS CITED in *Salisbury v. Herchenroder*, 103 Mass. 460, to the point that the fact that a natural cause contributes to produce an injury which could not have happened without the unlawful act of the defendant, does not make the act so remote as to excuse him. In that case a sign had been hung over a street in a city with due care as to its construction and fastenings, but in violation of a city ordinance which subjected its owner to a penalty for placing and keeping it there. The sign was blown down by an extraordinary gale of wind, and in its fall a bolt which was a part of its fastenings struck and broke a window in a neighboring building. The owner of the sign was held liable for the injury to the window.

MOOERS v. ALLEN.

[85 MAINE, 276.]

SUBMISSION OF SUIT TO ARBITRATORS AT COMMON LAW, and not under the statute nor under a rule of court, is a discontinuance of the pending action.

ACTION BY ADMINISTRATOR UPON AWARD OF ARBITRATORS made in favor of intestate, after his death, can not be maintained in behalf of the intes-

tate's assignee of the claim, the agreement to submit to arbitration containing no provisions authorizing intestate's assignee, or other representative, to act in his behalf or in his name in the prosecution of this claim before the arbitrators, and the administrator having taken no part in the proceedings.

DEBT upon award instituted by Mooers, the administrator of the plaintiff in the suit submitted to arbitration, and maintained for the benefit of the intestate's assignee. The case was submitted to this court upon facts agreed. The opinion states the case.

Bean, for the plaintiff.

Kempton, for the defendant.

By Court, RICE, J. Prior to April 5, 1850, Polly Allen, the plaintiff's intestate, had commenced an action at law against the defendant. On that day the parties, in writing, agreed to refer that suit, with the costs in the same, and all demands between the parties, to arbitrators, the report of whom, or a major part of whom, made as soon as may be convenient, to be final.

This being a submission, not under the statute nor under a rule of court, but at common law, was a discontinuance of the action then pending: *West v. Stanley*, 1 Hill (N. Y.), 69; *Towns v. Wilcox*, 12 Wend. 503; *Ex parte Wright*, 6 Cow. 399.

During the life of Polly Allen, the arbitrators, upon due notice, met the parties in interest, and after a hearing, for their own convenience and satisfaction continued said hearing until some time in May, 1850. Before the day of adjournment arrived Polly Allen deceased. After her decease, but prior to the third day of August, 1850, the arbitrators issued a new notice to the parties, in the name of Polly Allen, for a further hearing, on said third day of August, and they appeared upon said notice, whereupon the defendant filed a plea in bar or abatement, to the jurisdiction of the arbitrators, based upon the fact of the death of said Polly Allen, which plea was overruled by the arbitrators, who proceeded with the hearing, and on the sixth day of the same August made an award in favor of Polly Allen, and in her name.

The plaintiff was appointed administrator of the estate of Polly Allen, July 8, 1850, but does not appear to have taken any part in the hearing before the arbitrators, nor was his name used by them in any of their proceedings.

The case further finds that after the agreement to refer was entered into, and before the first hearing, the plaintiff's intes-

tate assigned all her right, title, and interest in the claim, action, and demand referred, to Ira Thing, who was sole owner of the same at the time of the several hearings before the arbitrators, and at the time of making and publishing their award, and that the claim was prosecuted for his sole benefit and interest.

The agreement to submit is a naked personal contract between the plaintiff's intestate and the defendant. It contains no provisions or stipulations authorizing her assignee or other representative to act in her behalf or in her name in the prosecution of this claim before the arbitrators. Her administrator did not assume to act in the premises, nor was his name used in the proceedings. Under such circumstances the arbitrators have no authority to proceed against the protestations of the defendant: *Blundell v. Bretargh*, 17 Ves. 231; *Rhodes v. Haigh*, 2 Barn. & Cress. 345; Story's Eq. Pl. 167. This award, therefore, can not constitute a foundation on which this action can be maintained. A nonsuit must therefore be entered.

SHEPLEY, C. J., and WELLS, HOWARD, and HATHAWAY, JJ., concurred.

ARBITRATION, EFFECT OF SUBMISSION TO, AS DISCHARGE OF PENDING ACTION: See note to *Nettleton v. Gridley*, 56 Am. Dec. 378, 381.

AGREEMENT TO ARBITRATE DEMAND IS NO BAR TO ACTION UPON IT: *Haggart v. Morgan*, 55 Am. Dec. 350, and extensive note discussing the subject, 354.

DEATH OF PARTY REVOKES POWER OF ARBITRATOR, AND AWARD MADE THEREAFTER IS VOID: *Whitfield v. Whitfield*, 47 Am. Dec. 350, and note citing prior cases.

SHAW v. BERRY.

[35 MAINE, 279.]

AUTHORITY OF ONE OF SEVERAL JOINT EXECUTORS OR ADMINISTRATORS IN ENTIRE with respect to the delivery, gift, sale, or release of the testator's goods.

ONE OF SEVERAL JOINT EXECUTORS OR ADMINISTRATORS MAY RELEASE DEBT due the estate.

POWER OF ADMINISTRATOR IS EQUAL TO AND WITH POWER OF EXECUTOR after administration is granted.

POWER TO RELEASE ABSOLUTE DEBT NECESSARILY INCLUDES AUTHORITY to release a contingent liability.

WITNESS'S LIABILITY TO ESTATE HAVING BEEN RELEASED by one of several joint administrators, he is no longer disqualified on the ground of interest.

THIS action was against the administrators of Jacob M. Berry, deceased. The defendants offered the testimony of a witness, which was objected to on the ground of the interest of the witness. The objection was sustained, and a release was then produced that was executed by one of the several administrators. His testimony was then admitted, notwithstanding the same objection on the ground of the witness's interest was still maintained. The plaintiff excepted. Verdict was for the defendants.

Evans, for the plaintiff.

H. W. Paine, for the defendants.

By Court, RICE, J. The only question reserved for the consideration of the court is whether James Berry, one of the administrators on the estate of Jacob M. Berry, had, by virtue of his office, authority to release any interest which the witness Sands had in the result of the suit.

It appears to be well settled, that if a man appoint several executors, they are esteemed in law but one person, representing the testator, and the acts done by any one of them, which relate to the delivery, gift, sale, or release of the testator's goods, are deemed the act of all. If one releases a debt, it is good and binds all the rest: *Wheeler v. Wheeler*, 9 Cow. 34.

In case of joint executors or administrators the authority of each is entire, and competent to the discharge of debts due the estate: *Hudson v. Hudson*, 1 Atk. 460.

After administration is granted, the power of an administrator is equal to and with the power of an executor: *Williams on Executors*, 609; *Toller on Executors*, 243; *Jacomb v. Harwood*, 2 Ves. sen. 265.

Power to release an absolute debt would necessarily include authority to release a contingent liability.

Exceptions overruled.

SHEPLEY, C. J., and WELLS, HOWARD, and HATHAWAY, JJ., concurred.

POWERS OF CO-EXECUTORS AND CO-ADMINISTRATORS: See *Beall v. Hilliary*, 54 Am. Dec. 649, and note citing prior cases.

RELEASE OF WITNESS'S INTEREST TO QUALIFY HIM TO TESTIFY: See *Bank of Utica v. Mersereau*, 49 Am. Dec. 189, and note 232, citing prior cases.

EXECUTORS AND ADMINISTRATORS STAND ON SAME GROUND with respect to their responsibilities, rights, and powers: *Murray v. Blatchford*, 19 Am. Dec. 537.

GILES v. VIGOREUX.

[35 MAINE, 300.] •

HIRER OF VESSEL ON SHARES IS OWNER for time in which he controls her under the contract, and the general owner is not liable on the hirer's contracts of shipment for supplies or for seamen's wages.

HIRER OF VESSEL ON SHARES BEING REGARDED AS OWNER, and having the benefit of the services of seamen hired by him, no implied *assumpsit* for compensation for such services can arise against the general owner.

ENROLLMENT OR REGISTRY OF VESSEL DOES NOT MAKE OWNER LIABLE for seamen's wages when the vessel is let on shares.

EXISTENCE OF REMEDY IN REM FOR SEAMEN'S WAGES lays no foundation for a right of action *ex contractu* against the general owner who has let the vessel on shares.

ASSUMPSIT to recover wages of the plaintiff earned in the capacity of sailor on the schooner *Mary*. The defendant was the general owner of the schooner. The opinion states the case. The case was submitted on facts agreed.

Whitmore for the plaintiff.

Danforth and Woods, for the defendant.

By Court, WELLS, J. During the time the services were performed by the plaintiff the schooner was let by the defendant to the master, Welcome Partridge, who was to victual and man her at his own expense, was to have and did have the use and control of her, to employ her as he should choose, and to pay the owner one half her earnings, deducting one half of the port charges. The plaintiff was employed by Partridge.

The law appears to be well settled by numerous decisions, that the general owner of a vessel is not liable for shipments or for supplies obtained by the master, who has the control of a vessel under a contract like that made in the present case: *Thompson v. Snow*, 4 Greenl. 264 [16 Am. Dec. 263]; *Emery v. Hersey*, Id. 407 [16 Am. Dec. 268]; *Winsor v. Cutts*, 7 Id. 261; *Cutler v. Thurlo*, 20 Me. 213; *Sproat v. Donnell*, 26 Id. 185 [45 Am. Dec. 103]; *Thompson v. Hamilton*, 12 Pick. 425 [23 Am. Dec. 619]; *Webb v. Pierce*, 1 Sprague, 192.

These cases were decided upon the ground that the hirer is the owner of the vessel for the time in which he exercises control over her under the contract, and that he acts for himself in making contracts of shipment and for supplies, and not as agent of the general owners.

The same principle must apply to seamen's wages. They contract with the owner *pro hac vice*, while the general owner has

made no contract with them: *Aspinwall v. Bartlet*, 8 Mass. 483; *Goodridge v. Lord*, 10 Id. 483. The hirer in such case being regarded as the owner, and having the benefit of the services, no implied *assumpsit* can arise against the person who has let to him the vessel. Where there are several owners of a vessel they are tenants in common, and are generally to be regarded in the same manner as tenants in common of other chattels. And the enrollment or registry does not make the owner any more liable for seamen's wages when the vessel is let on shares than the landlord of a house would be for the wages of the servants employed by the tenant. Notwithstanding the general owner has parted with the control of the vessel, the seamen would have a remedy against it by a process *in rem*, for they have in ordinary cases a threefold remedy, against the ship, the owners, and the master: *Abbott on Ship*. 475. By arresting the vessel, the general owners may be made indirectly liable for seamen's wages. But this claim upon the vessel arises from the nature of their employment, and is to be pursued in a court of admiralty. It is a proceeding authorized by the marine law, and also by the act of congress of 1790, c. 56, sec. 6. As the vessel has been brought safely into port by their exertions, it should be a security for their compensation. But the existence of such claim lays no foundation for a right of action *ex contractu* against an owner who has parted with the control of his vessel by letting it to another, as was done by the defendant.

In the case of *Skolfield v. Potter*, Daveis, 392, there was a special promise made by the owners to the plaintiff to pay the order drawn on them in his favor by the master when it was presented, and the freight earned on the cargo brought home was collected by one of the owners and retained in their hands. These facts might warrant the decision in favor of the plaintiff, although the vessel was let to the master on shares.

According to the agreement of the parties a nonsuit must be entered.

SHEPLEY, C. J., and HOWARD, RICE, and HATHAWAY, JJ., concurred.

GENERAL OWNER HAVING LET VESSEL, IS NOT LIABLE for non-delivery of goods shipped for the voyage: *Pitkin v. Brainard*, 13 Am. Dec. 79. This case also held that the fact that the custom-house papers showing the ownership of the vessel were not changed was immaterial. When one becomes the owner *pro hac vice*, the general owner is released from liability: *Thompson v. Snow*, 16 Id. 263. See *Emery v. Hersey*, Id. 268. Where the owner has parted with the possession and control of the vessel, and retains the title

only for the purpose of securing future payments of the purchase money, he will not be liable as owner: *Jones v. Pitcher*, 24 Id. 716; *Brooks v. Bondary*, 28 Id. 313.

SEAMEN HAVE LIEN FOR SERVICES ON HIGH SEAS: *Case v. Woolley*, 32 Am. Dec. 54.

NEWBIT v. STATUCK.

[35 MAINE, 315.]

TO SUSTAIN PLEA OF JUSTIFICATION IN ACTION FOR SLANDER in charging perjury, the defendant must give as conclusive proof as would be necessary to convict the plaintiff of perjury on an indictment.

ALLEGED PERJURED TESTIMONY, HAVING BEEN INTRODUCED BY DEFENDANT under plea of justification in an action for slander in charging perjury, is evidence of its own truth, although the plaintiff could not testify in his own case.

EVIDENCE OF ONE WITNESS IS NOT SUFFICIENT TO CONVICT OF PERJURY, as the case is then in equilibrium, oath weighing against oath.

SPECIAL DAMAGE NEED NOT BE ALLEGED OR PROVED IN ACTION FOR SLANDER upon words actionable *per se*. Some damage is implied by law in such case, and the jury determines the amount, having reference to the degree of malice exhibited by the defendant, and the injurious consequences necessarily resulting to the plaintiff.

CASE for slander in charging perjury. The defendant, in his brief statement, set forth statements made by the plaintiff as a witness upon the trial of an action against the defendant, alleged that these statements were untrue, and that in uttering them the plaintiff was aware of the untruth of his evidence, and was guilty of perjury. Evidence of the testimony of this plaintiff in the former suit was introduced by the defendant, and evidence as to its truth or falsity was introduced by both parties. The court instructed the jury that, notwithstanding the plaintiff's incapacity to testify in his own case, his testimony in the former case, that had been introduced by the defendant, was to be considered as a part of the testimony in this case in connection with the other testimony concerning its truth or falsity. The instruction requested by the defendant, that if the jury should find against the defendant they should assess only nominal damages, as no damage had been proved, was refused. Verdict for the plaintiff, and exceptions by the defendant to the instructions given and to the refusal of instructions. The case is otherwise sufficiently stated in the opinion.

Evans, for the plaintiff.

Lowell, for the defendant.

By Court, RICE, J. This is an action on the case for slander. Defense, that the words spoken were true. Complaint is made that the judge who presided at the trial, after instructing the jury that the burden of proof was upon the defendant to satisfy them that the allegations in justification contained in his brief statement were true, also instructed them that "if they were left in doubt and uncertainty respecting them, the defense contained in the brief statement would fail."

Without, at this time, going into the consideration of distinctions supposed to exist between the terms "preponderance of evidence," "satisfactory evidence," and that degree of evidence which shall exclude "all reasonable doubt," it is sufficient to say, that upon principle and authority, in actions of slander, wherein the allegation in the writ is that the plaintiff has been charged with perjury, the defendant, to sustain a plea of justification, must give as conclusive proof as would be necessary to convict the plaintiff of perjury on an indictment: *Gants v. Vinard*, 1 Ind. 476; *Woodbeck v. Keller*, 6 Cow. 118; *Lanter v. McEwen*, 8 Blackf. 495; *Byrket v. Monohon*, 7 Id. 83 [41 Am. Dec. 212]; *Matthews v. State*, 2 Yerg. 235. This instruction is not therefore open to objection.

Objection is also taken to the instruction that the testimony of the plaintiff on a former trial, which was introduced in this case by the defendant, might be considered by the jury as evidence in this case. Such a result legitimately and necessarily follows from the rule stated above. If the plaintiff were on trial for perjury, and one witness only were produced to swear that his testimony was false, a jury would not be authorized to convict without additional evidence, because the case would be in equilibrium, being oath against oath, and both given under circumstances where the obligation to speak the truth was alike binding. Such is the rule universally recognized in this class of prosecutions.

The requested instruction was properly withheld. When words are actionable in themselves, it is not necessary to allege or prove special damage. In such cases, that some damage has been sustained is an implication of law, and it is for the jury to determine the amount, having reference to the degree of malice exhibited by the defendant, and the injurious consequences necessarily resulting to the plaintiff.

Exceptions overruled.

WELLS, HOWARD, and HATHAWAY, JJ., concurred.

TO SUSTAIN PLEA OF JUSTIFICATION IN ACTION FOR SLANDER in charging perjury, defendant must adduce evidence sufficient to convict plaintiff on an indictment: *Byrket v. Monohon*, 41 Am. Dec. 212, and note. The truth of the charge of perjury must be proved by two witnesses, or by one witness and strong corroborating circumstances: *Id.* The burden of proof under such a plea is on the defendant: *Offutt v. Earlywine*, 32 Id. 40.

SOME DAMAGE IS IMPLIED FROM UTTERANCE OF WORDS ACTIONABLE PER SE: *Yeates v. Reed*, 32 Am. Dec. 43; *Gilman v. Lowell*, 24 Id. 96. Measure of damages is a question for the jury to consider relatively with that of malice: *Davis v. Ruff*, 34 Id. 584.

PALMER v. FOGG.

[35 MAINE, 368.]

ONE HAVING CONTRACTED TO HAUL LOGS INTO STREAM FULFILLS HIS CONTRACT by landing the logs at any point within the stream, whether they could be run from that point or not.

STATEMENT IN CAPTION OF DEPOSITION THAT DEPONENT WAS FIRST SWORN is sufficient evidence that the deponent was sworn before the deposition was given.

DEPOSITIONS PURPORTING TO HAVE BEEN TAKEN ON NOTICE TO ADVERSE PARTY, before a commissioner appointed to take depositions in another state, need not, under the Maine statute, be shown by evidence *aliunde* to have been taken and certified by a person legally empowered.

DEPOSITIONS MADE RETURNABLE TO TERM OF COURT SUBSEQUENTLY ABOLISHED, by a statute that transferred its business to a subsequent specified term, may be properly filed and opened at the subsequent specified term.

CONVERSATIONS OF PARTIES TO CONTRACT CONCERNING ITS PROVISIONS are not admissible in evidence after the contract has been reduced to writing.

TWO PARTIES TO CONTRACT CAN NOT BIND OTHER PARTIES TO CONTRACT by independent agreement in reference to the original contract.

INDEPENDENT AGREEMENT BETWEEN TWO OF SEVERAL PARTIES TO CONTRACT is admissible upon a question whether there has been a modification of the original contract as tending to show that such a modification did not appear unreasonable to the parties to the independent agreement.

ASSUMPSIT by Palmer and others against Fogg to recover their share of the amount paid on a contract for cutting and hauling logs. Fogg entered into a contract with the proprietors of a timber township. He agreed to cut and haul logs at a stipulated price per thousand feet. By the contract four teams of oxen were to be worked upon the eastern side of the township, and were to haul into the Pine stream. The other teams, which the contract stipulated should be continuously at work, were to be located in other parts of the township and to haul to different streams. After this contract was made by a written contract between the parties to this action it was agreed that the

plaintiffs should have half the original contract, and "be equal" with Fogg; "the division to be made equal as to the operation as can be got at by lotting and bidding for chance, after going on the land." These parties then commenced the performance of the original contract and completed it. Fogg's teams were put upon the east part of the township and hauled logs to a point upon Pine stream, where there was a landing place from which lumber could be conveniently run. Above this point on Pine stream the bed of the stream was filled with rocks and other obstructions, making it impracticable to drive logs there unless a great expense were incurred. Fogg, the defendant, claimed that this part of the hauling was more expensive than that performed by the plaintiffs, and that in order to equalize their rights he should be allowed twenty-five cents per thousand feet more for the hauling performed by him than the plaintiffs should receive upon the logs hauled by them, their location being the more favorable. The plaintiffs contended that the extra expense incurred by Fogg in hauling to the lower point on Pine stream was voluntary on his part, and that he would have fulfilled his contract with the proprietors if he had hauled to the point on Pine stream nearest to him, and that he was under no obligation to inquire from what point upon the stream the logs could be conveniently driven. And the jury were instructed to this effect. Fogg further contended that the contract had been modified so as to allow an equalization upon settlement. Evidence upon this point was introduced by both parties. A witness, by name Corson, was introduced by the defendant to testify to a conversation between James Palmer, one of the plaintiffs, and the defendant concerning an equalization upon settlement. But this testimony was objected to, on the ground that the arrangement between the parties was at the close of the conversation reduced to writing, signed by Palmer, and put into the defendant's hands. The testimony was taken *de bene esse*, but the judge instructed the jury to disregard it. The writing containing the agreement between Palmer and Fogg was introduced by the latter. The material part was as follows: "I hereby agree with Joshua Fogg to be [bear] my part, in every respect, of expense in obtaining our pay for the lumbering business of the past winter; also agree to an equal division of chances of teams on their location rights, as to make them equal in regard to worth to haul and value. James Palmer." The judge in construing this contract instructed the jury that it contained no admission by Palmer that any modification had

been made of the original contract between the parties to this action, but that it was an independent agreement; that one of the plaintiffs could not by making a new agreement concerning the former transaction essentially vary the former contract, so as to affect the rights of his co-plaintiffs, unless they assented to or ratified the new agreement, or unless the plaintiffs were partners in the transaction. But the jury were instructed that the writing might have a tendency to show that Palmer did not consider the modification of the original agreement to be unreasonable; and in this way the paper might have a legitimate bearing upon the question whether there had been a modification of the former contract. Three depositions were introduced by the plaintiffs. They were taken in Wisconsin, returnable to the June term of 1852. To these depositions the defendant objected, on the grounds stated in the opinion. The objections were overruled, and the defendant excepted to this and to the instruction of the court.

Hutchinson and Leavitt, for the plaintiffs.

J. S. Abbott, for the defendant.

By Court, HATHAWAY, J. By the terms of the contract, Fogg was to haul the logs into Pine stream.

The judge instructed the jury that "under the contract Fogg had the legal right to land the logs in Pine stream without regard to the question whether they could not be run as the stream then was, he not being required to inform himself from what points in the stream timber could not be run."

There was no stipulation in the contract as to any particular place in Pine stream where the logs should be landed, and of course, landing them in the stream was a literal fulfillment of it. The instruction was right.

The defendant objected to the admission of certain depositions purporting to have been taken before a commissioner in Wisconsin, appointed by the governor of this state: 1. Because it did not appear that the deponents were sworn before the depositions were given; 2. Because the signature and qualifications of the person taking them were not shown; and 3. Because they were not filed at the term of the court for which they were taken.

The captions of the depositions state expressly that the deponents were first sworn. They appear to have been taken on notice given to the adverse party, and the counsel for the defendant claims, under the thirtieth rule of this court, that it was incumbent on the plaintiffs to prove that they were taken and

certified by a person legally empowered, etc. But by the revised statutes, c. 134, such commissioners and their official acts are placed upon the same footing with justices of the peace and their official acts within this state. Hence, authentication *aliunde* is not required: *Bullen v. Arnold*, 31 Me. 583.

The depositions were returnable to the term of the court to be holden in June; they were opened and filed at the term held in October next ensuing. The statute of 1852, c. 246, abolished the June term, and transferred all its business to the term to be holden in October, at which term the depositions were properly filed and opened.

Hiram Corson's testimony as to Palmer's conversation with Fogg was properly excluded. The conversation was reduced to writing and signed by Palmer. The witness stated that "the paper written and signed by Palmer embodied the substance of the conversation and admissions of Palmer and the agreement which took place, and stated verbally by the parties as he (the witness) understood it."

The writing signed by Palmer was introduced, and was of course better evidence than Corson's recollections. The construction given by the judge to that writing of November 2, 1842, signed by Palmer, was clearly correct, and his instructions concerning the use which might be made of it as evidence were sufficiently favorable to the defendant.

Exceptions overruled.

Judgment on the verdict.

SHEPLEY, C. J., and WELLS, HOWARD, and RICE, JJ., concurred.

PAROL EVIDENCE TO VARY TERMS OF WRITING: *Porter v. Pierce*, 55 Am. Dec. 151; *Waddell v. Glassell*, 54 Id. 170; *West v. Kelly*, Id. 192, and notes citing prior cases. Parol evidence of prior or contemporaneous conversations, circumstances, usages, etc., is inadmissible to contradict, control, or explain an unambiguous written contract: *Glendale Woolen Co. v. P. I. Co.*, 54 Id. 209. But see *Rearick v. Swinehart*, 51 Id. 540.

ALTERATION OR MODIFICATION OF WRITTEN CONTRACT by subsequent parol agreement: See *Cummings v. Arnold*, 37 Am. Dec. 155, and prior cases cited in note.

DEPOSITIONS, OFFICER TAKING, PRESUMED TO HAVE AUTHORITY: *Crane v. Thayer*, 46 Am. Dec. 142.

DEPOSITION OMITTING IN CAPTION WORDS "BEFORE ME," preceding name of magistrate before whom it was taken, is incompetent evidence: *Powers v. Shepard*, 53 Am. Dec. 168.

MACHIAS HOTEL COMPANY v. COYLE.

[35 MAINE, 405.]

ACTION UPON PROMISE IS MAINTAINABLE only when consideration is derived by one party from another party to the suit, negotiable paper excepted. **PARTY FOR WHOSE BENEFIT CONTRACT WAS MADE MAY MAINTAIN SUIT** thereon in his own name, disregarding the agency or name by which he acted in the formation of the contract, provided the consideration is derived by one party from another party to the suit.

ONE SUBSCRIBING FOR SHARES IN BUILDING ASSOCIATION IS NOT LIABLE on his subscription to a corporation formed of a part of the subscribers for the purpose of carrying out the designs of the association, when the subscription paper contains no provision concerning the incorporation of the association. There is no privity of contract.

ACTION CAN NOT BE MAINTAINED TO RECOVER MONEY EXPENDED at no request of the defendant, express or implied, nor for any purpose from which he could derive any benefit.

CORPORATION FORMED FROM ASSOCIATION OF INDIVIDUALS FOR BUSINESS PURPOSES, without the consent of a subscriber to the association, can not recover on subscriber's subscription for money laid out and expended by itself for the use of the defendant, as there is no consideration between the parties, nor for money expended by the association before the incorporation, as the corporation is not identified with those whose money was expended.

ASSUMPSIT by the Machias Hotel Company, a corporation, to recover the subscription of the defendant Coyle to the association, from which the corporation was formed. The writ contained the money counts, as well as the count upon the defendant's promise to pay his subscription. The case was submitted on facts agreed. The case is otherwise sufficiently stated in the opinion.

R. K. and C. W. Porter, for the plaintiffs.

B. Bradbury, for the defendant.

By Court, **SHEPLEY, C. J.** The subscribers to the paper, bearing date on August 4, 1851, associated for the purpose of building a hotel. Each agreed to take and pay for a certain number of shares to such person as should be appointed their treasurer. The paper is wholly silent respecting any design of the subscribers to become a body corporate. It contains no authority for any one to make application for an act of incorporation, or any authority for the subscribers to vote or act upon that subject.

By an act approved on February 18, 1852, some of the subscribers were incorporated by the name of the Machias Hotel

Company. By a comparison of the names of the corporators and their associates with those of the subscribers, it appears that several of the latter did not become members of the corporation. It does not appear that they in any manner assented to or recognized its proceedings as affecting them or their interests. The defendant did not.

The amount subscribed by the associates could not have been promised by or for the corporation. The promise of the defendant was not made to the corporation or to any one acting for it. If the promises of the associates were binding, each had a personal interest in the performance of the promise of every other, of which he could not be deprived without his consent.

A valid promise may be made to an individual, or to a joint-stock company, or to a corporation, by description or in the name of an agent; and an action may be maintained, in its own proper name, by such person, association, or corporation. But this is true only when the consideration, which is the essence of the contract, is derived by one party from another party to the suit. (This remark can have no reference to negotiable paper.) In such cases, the agency or the name by which one party acts may be disregarded, and the suit may be maintained in the name of the party for whose benefit the contract was made.

It is admitted that this suit can not be maintained upon a promise of the defendant made to others, with whom the corporation is not identified, while it is insisted that it can be on the count for money laid out and expended for the use of the defendant.

There is no proof of an expenditure of money by the corporation at the request of the defendant, express or implied, or for a purpose from which he could derive any benefit. The corporation does not appear to have expended money except for property or purposes of its own, in which the defendant has no interest.

It is admitted that the associates, before the act of incorporation was obtained, expended one thousand dollars. If the property thus procured by individuals was conveyed by them to the corporation, the defendant could probably derive no benefit from that expenditure. If he could, or if those individuals retain the property and can be considered as holding it in trust for the associates, the corporation not being identified with those whose money was expended, can not claim to have conferred a benefit upon the defendant by its expenditure. The

essential difficulty is, that there is no proof of any consideration between these parties, either by benefit received by one or injury sustained by the other.

Plaintiff nonsuit.

TENNEY, RICE, HATHAWAY, and APPLETON, JJ., concurred.

ACTIONS UPON SUBSCRIPTIONS.—In *Chambers v. Calhoun*, 55 Am. Dec. 583, it was held that a promise to pay to a building committee a certain amount of money to build a church, made by one of the committee, might be enforced by the other members of the committee or their survivors, by an action at law against the promisor. See also *State Treasurer v. Cross*, 31 Id. 626. The principal case is somewhat analogous to the case where, in a suit upon a subscription to the stock of a corporation, the subscriber defends that an amendment has been made to the charter of the corporation without his consent, whereby the contract of his subscription has been broken, and that therefore he is no longer bound by it. This question is treated *in extenso* in the note to *Commonwealth v. Cullen*, 53 Am. Dec. 461.

SUIT BY PRINCIPAL ON CONTRACT MADE BY AGENT: See *Violett v. Powell's Adm'rs*, 52 Am. Dec. 548, and cases cited in note. And see *Salmon v. Hoffman*, 56 Id. 322.

ONE IN WHOSE FAVOR CONTRACT IS MADE UPON CONSIDERATION which moves from another may maintain action thereon in what cases: See *Robbins v. Ayres*, 47 Am. Dec. 125, and cases cited in the note.

EARL v. ROWE.

[35 MAINE, 414.]

DEVISE OF NET PROFITS OF LAND IS DEVISE OF LAND ITSELF for such time as the profits are devised.

DEVISE OF ONE THIRD OF NET PROFITS OF LAND is a devise of one third of the land, and does not authorize the inference that the devisee was to receive the profits from the other devisees of the land, and not from the estate.

PROBATE COURT MAY PARTITION REAL ESTATE AMONG HEIRS AND DEVISEES under Maine statute, and may set off to a devisee of net profits his portion of the land devised.

POWER OF PROBATE COURT TO PARTITION DECEDENT'S REALTY AMONG HEIRS AND DEVISEES under Maine statute is not limited to any particular time or number of years after the estate is settled.

JURISDICTION OF PROBATE COURT TO PARTITION DECEDENT'S REALTY IS NOT RESTRICTED under the Maine statute because the share or proportion may be uncertain, depending upon the construction or effect of any devise, unless it shall appear to the judge to be uncertain.

TRESPASS *quare clausum fregit*. John Rowe, deceased, devised his realty to Ephraim, his son. Ephraim died, and John Rowe added a codicil to his will, by which he disposed of the same

property. The codicil was as follows: "I bequeath the land to the three sons of my late son Ephraim, now minors, in equal proportions, as they shall arrive at twenty-one years of age, and in case of the death of either of them before the age of twenty-one years and unmarried, then his share shall descend to the surviving brother or brothers; and for the better support and education of my grandchildren before named, I do hereby give and bequeath all the profits arising from the estate before named to my daughter-in-law, Keziah Rowe, until and for the term that my grandsons shall attain the age of twenty-one years, and in case she shall at that time remain the widow of my late son, Ephraim Rowe, then she shall receive for her support one third part of the net profits of the aforesaid bequeathed estate so long as she shall remain such widow, and no longer." One of the three grandsons died unmarried before reaching his majority; and this plaintiff became vested with the title of the survivors by means of a levy and deed. Keziah Rowe, the defendant, is still the widow of Ephraim. Her defense to this action is, that under the codicil she became the owner of a life-estate in one undivided third of the land, and that by decree of the probate court one third of the land was set off to her by metes and bounds, and upon this parcel of land this trespass was committed. The case was submitted upon facts agreed. Two questions were submitted for decision: 1. Whether under the codicil Keziah Rowe took a life estate in an undivided third of the land; 2. Whether the decree of the probate court was valid.

D. Goodenow and J. S. Kimball, for the plaintiff.

N. D. Appleton, for the defendant.

- By Court, SHEPLEY, C. J. The first question presented for decision is, whether John Rowe by his will devised to Keziah Rowe one third part of his estate for life. It is not denied that by the codicil an estate was devised to her during the minority of her sons, while it is insisted for the plaintiff that her estate then terminated, and that she was to receive for her support one third part of the net profits in the nature of a legacy to be paid by her sons, who were then to become the owners of the whole estate.

The effect of a devise of the "occupation and profits" of land, when there was no devise in terms of the land, became early a subject of judicial consideration, and the decision was, that it was in substance a devise of the land: *Paramour v. Yardley*,

Plow. 540. And a devise of "half the issues and profits" of the land was decided to be a devise of half of the land. "For to have the issues and profits and to have the land is all one:" *Parker v. Plummer*, Cro. Eliz. 190. The rule established by these cases has continued to be the settled rule of construction; and any terms equivalent to these have been regarded as a devise of the estate for such time as the issues, incomes, rents, or profits were devised.

While this general rule is admitted, it is insisted that the language used in the codicil exhibits a different intention. The language used is, "she shall receive for her support one third part of the net profits of the aforesaid bequeathed estate so long as she shall remain such widow, and no longer."

The words "she shall receive," having been used to confer a right, are equivalent to a declaration that she shall be entitled to receive. The use of the word "receive" does not therefore authorize an inference that she was to receive the profits from her sons, and not from the estate. It is said that its use in connection with the words "net profits" exhibits an intention that she should receive from her sons one third of the profits after all charges for repairs, taxes, and expenses had been deducted. This assumes that it must have been his intention to subject her and them to the inconvenience and to the constant danger of litigation, to determine yearly what the net profits of the estate were or would be. It is more reasonable to conclude that the word "net" was used to guard against a claim on her part to have one third of the income without being subjected to the payment of one third of the taxes and repairs. It is quite probable that the testator did not contemplate a division of the estate; and that he expected that the mother and her sons would manage the estate together; and the use of the word "net" would then be appropriate to determine more exactly the extent of her rights; and it might be useful to make it certain, that she was to be chargeable with one third part of the taxes and repairs.

In the case of *Parker v. Plummer*, *supra*, the devise was of half the issues and profits to the wife during life, "bearing and allowing half the charges thereof." It was, therefore, in effect a devise of the net issues and profits. The words "bearing and allowing half the charges thereof" communicate the idea that the charges were not by the testator expected to be made upon each half separately, but upon the estate as a whole; and yet they did not prevent the conclusion that she took an estate for life.

But the effect in such a devise of the phrase "net income" has been determined by the case of *Andrews v. Boyd*, 5 Greenl. 199. It was in that case said "the income of an estate means nothing more than the profit which it will yield, after deducting the charges of management; and the devise of one third of the net income of it was decided to be a devise of one third of the land.

By "net profits" the testator in this case could have meant only the profits accruing to the widow after the taxes and expenditures for repairs had been paid out of what would be obtained from the estate. If she took an estate in one third part of the land there would be a charge upon it, and she would obtain no more or less from it than the testator intended that she should.

To decide that one third of the estate was devised to her is to give effect, so far as it respects the amount to be taken from the owners of the other two thirds to be appropriated to her support, to the exact intentions of the testator, and to do it in the mode best suited to promote the harmony and comfort and least troublesome and expensive to all interested in the estate, and to afford the most perfect security to the devisee of the profits. This more perfect security of the profits to the devisee of them has ever been considered as one of the strongest reasons for the establishment and continuance of the rule.

The first question must be answered affirmatively.

It remains to be considered whether the court of probate was authorized to cause one third part of the estate to be assigned to her.

It is provided by statute, c. 108, sec. 1, that the court of probate in which the estate of any deceased person is settled, or in course of settlement, may make partition of all his real estate lying within this state among his heirs or devisees under the restrictions contained in this chapter. This power is sufficiently extensive to include a case like the present, if no restriction be in the subsequent sections. The exercise of the power is not limited to any particular time or number of years after the estate is settled. The provisions of the second section show that the estate might be expected to be divided in certain cases long after the decease of the testator and the settlement of his estate; for a partition of a remainder or reversion is authorized after the termination of a life or particular estate created by devise.

The restrictions contained in the third section did not deprive

the court of probate of jurisdiction in this case. The shares or proportions of the respective parties do not appear to have been in dispute. If the widow was entitled to any share, there could be no doubt that she was entitled to one third, and that the two thirds were owned by others.

The jurisdiction is not restricted because the share or proportion was "uncertain, depending upon the construction or effect of any devise, unless it shall appear to the judge to be uncertain." If he should exercise jurisdiction in a case in which the proportion did not appear to him to be uncertain, and his opinion should be erroneous, the aggrieved party would have a perfect remedy by an appeal from his decision or decree.

This question must also be answered affirmatively, that the proceedings are valid.

TENNEY, WELLS, HOWARD, and APPLETON, JJ., concurred.

PARTITION OF DECEDENT'S ESTATE IS MERELY INCIDENTAL TO GENERAL PROBATE JURISDICTION, and is void if grant of administration is void: *Sigourney v. Sibley*, 32 Am. Dec. 248.

HARMON v. SALMON FALLS MANUFACTURING CO.

[35 MAINE, 447.]

REGULATION OF MANUFACTURING CORPORATION THAT EMPLOYEES MUST GIVE NOTICE before quitting the company's employment, or else forfeit their wages accrued, is valid and binding upon employees with notice.

CLAUSE THAT WAGES ACCRUED SHALL BE FORFEITED IS ESSENTIAL in order that regulation of employer that employees shall give notice of intention to leave his employment may be a defense in an action for the wages.

ONE WILLFULLY VIOLATING CONTRACT, AND THEREBY EXPOSING HIMSELF TO AGREED PENALTY or forfeiture, can obtain relief neither at law nor in equity.

RECOVERY OF COMPENSATION FOR SERVICES PERFORMED ON CONTRACT BROKEN by the plaintiff can be had only where there has been no willful violation, or where performance has been waived, or other legal excuse exists.

EMPLOYEE IS BOUND BY NOTICE OF EMPLOYER'S REGULATIONS, otherwise valid, without signing them.

EMPLOYEE CONTINUING TO WORK FOR EMPLOYER AFTER PRINTED COPY OF EMPLOYER'S REGULATIONS were delivered to him, must be considered as having agreed to them.

STIPULATION IN EMPLOYER'S REGULATIONS THAT PAYMENT OF WAGES shall not be made without compliance therewith is a sufficient clause of forfeiture.

BURDEN OF PROOF IS ON EMPLOYEE TO SHOW that he left by employer's permission, or had worked as long as he agreed to, when seeking to recover compensation for services performed, if he had notice of employer's regulation requiring notice of intention to quit, and stipulating a forfeiture of wages in default thereof.

OBJECTION THAT CONTRACT IS NOT MUTUAL IN CASE OF REGULATION OF EMPLOYER requiring notice of employee's intention to quit, because the employer may discharge employee without giving him notice, is untenable. It is not necessary that each party to a contract assume precisely the same obligations.

NO LIMITATION OF TIME DURING WHICH EMPLOYEE WAS NOT TO BE PAID being inserted in employer's regulation providing for such forfeiture if the employee gives no notice of intention to quit, it will be intended to operate upon all the wages earned subsequent to the last settlement.

SUM ALLOWED TO EMPLOYEE FOR BOARD, "in addition" to "thirteen cents per piece" for weaving, is a payment in part for services in weaving, and will be forfeited, together with other wages.

ASSUMPSIT by F. L. Harmon and Almeda, his wife, to recover the value of services performed by her before marriage. She worked for the defendant eighteen days, and during that time wove fifty-seven pieces, which at thirteen cents apiece amounted to seven dollars and forty-one cents. Ten cents for board was, in addition to this sum, due her, and this action was brought to recover seven dollars and fifty-one cents. The day before she commenced work, a printed copy of the company's regulations was delivered to her by the company at their counting-room. The material portions of these regulations are set forth in the opinion. Eighteen days after commencing labor she quit the employment. At that time she was not sick, and had not "given or worked out" the notice stipulated in the regulations. On these agreed facts the case was submitted to this court for determination.

Luques, for the plaintiffs.

J. N. Goodwin, for the defendants.

By Court, **SHEPLEY, C. J.** The case is presented for decision upon facts agreed; the amount claimed is small. The principles involved are alleged to be of importance. It is not difficult to perceive that they may be so. A corporation or an individual employing several hundreds of persons may have contracted to furnish large quantities of manufactured goods for sale or exportation at certain times; and if the persons employed to perform the labor may, in violation of their agreements and without loss of wages, leave the machinery at rest until other persons can be procured to take their places, no confidence can be re-

posed in the manufacturer's ability to fulfill his contracts, and he can obtain no indemnity for losses occasioned by the fault of others. To offer to such an employer the right to have a legal contest, and the chance thereby to recover damages for the injury he may be able to prove that he has suffered by a violation of each laborer's contract, is little less to him than solemn mockery. The manufacturer and all his laborers would know that the trouble and expense of such suits would prevent any attempt in that mode to obtain redress. The only valuable protection which the manufacturer can provide against such liability to loss, and against what are in these days denominated "strikes," is to make an agreement with his laborers, that if they willfully leave their machines and his employment without previous notice, all or a certain amount of wages that may be due to them shall be forfeited. While courts of justice should not attempt by construction to make such agreements between the employer and those employed, they should not shrink from the duty of causing them, when fairly made, to be honestly and faithfully executed; or attempt by construction to aid a party to avoid the penalty to which he has agreed to expose himself for a willful violation of his contract.

The rule of law that one who makes a contract must perform it before he can maintain an action founded upon it, unless he can present a legal excuse, is too important for the prosperity of business, for the security of honest dealings, and for the maintenance of good order in the community to be lightly regarded. If there has at any time appeared to be a relaxation of it, that has long since ceased to be so in this state.

One who will willfully violate a contract, and thereby expose himself to an agreed penalty or forfeiture, can not expect to obtain relief by the rules of moral right and wrong, or by those of equity jurisprudence or the common law.

There is, indeed, a class of cases in which a party who has violated his contract has been permitted to make it the foundation of a suit to recover compensation for services performed by virtue of it. These are cases, so far as they rest upon sound legal principles, in which there has been no willful violation, or in which there has been a waiver of that performance, or other legal excuse.

It appears to have been supposed by some, without just reason, that the cases of *Hunt v. The Otis Company*, 4 Met. 464, and of *Fuller v. Brown*, 11 Id. 440, exhibited a relaxation of the law affirmed in the cases of *Stark v. Parker*, 2 Pick. 267 [13 Am.

Dec. 425], and of *Olmstead v. Beale*, 19 Id. 528. The case of *Hunt v. The Otis Company*, *supra*, appears to have been decided upon the ground that the regulation of the company "did not contain in its terms the stipulation that in case of quitting without giving the four weeks' notice, the wages accrued should be forfeited." While it is said, "had this been the case, the plaintiff would then fall within the penalty." It is also stated, if the construction then given to the regulation should produce injurious effects to the defendants, "they have only to enlarge their rule by adding to it a clause of forfeiture of wages accrued, and a requisition that operatives entering into their service shall sign it." This last remark is relied upon as deciding that the regulations of a company will not be binding upon those employed unless they signify their assent by subscribing to them. That this could not have been the intention of the court is quite apparent, for the whole case rests upon the position that the plaintiff was bound by the regulations of the company not subscribed by him. If he were not so bound, the regulations, whatever might have been their true construction, could have presented no defense, and the elaborate opinion to ascertain and enforce the adopted construction would have been a useless production.

That a person may be bound by a regulation, stipulation, or notice to which he has not subscribed his name is shown by many decided cases: by insurance cases, in which the party assured has been uniformly held to be bound by the stipulations contained in his policy; by cases against common carriers, when their notices have been held to operate upon the rights of employers who have knowledge of them; and by a variety of other cases.

The case of *Fuller v. Brown*, *supra*, so far as it respects the point now under consideration, only decides that a stipulation to give four weeks' notice before leaving, and to work four weeks afterwards, and then receive his pay, would not be violated if he left by reason of sickness.

It will be in season to consider whether the latter clause of the instructions, stating that he "was entitled to recover his wages without deduction for damages," and to which exceptions were taken, can command assent when it shall be properly presented: *Batterman v. Pierce*, 3 Hill (N. Y.), 174.

The argument for the plaintiffs insists that the regulations of the company did not become a part of the contract between it and the female plaintiff. It is a fact agreed that a printed paper

containing the regulations of the company was delivered to her before she commenced to work. In these regulations were the following clauses: "Any person intending to leave the company's employment must give notice to her or his overseer two weeks, at least, previous to leaving, and continue to work until the expiration of the notice. Those who leave contrary to this regulation (cases of sickness excepted) will not be settled with or paid till such notice is regularly given and worked out. The foregoing regulations will be regarded as an express contract between the corporation and all persons in its employ; and all who continue to work for the corporation will be considered as agreeing to the terms here stated, particularly those relating to the hours of labor and notice of leaving."

The female plaintiff, by continuing to work for the company after these regulations were delivered to her, must be considered as having agreed to them, and therefore, as having expressly agreed that she was not to be paid till the required notice had been regularly given and worked out. She can not now avoid the effect of that agreement and maintain an action without proof of a compliance with its terms.

It is agreed that she "did not give or work out the notice required by said paper, and that she was not sick." It is said that the regulations do not contain any clause of forfeiture. The word "forfeiture" is not found in them, nor was it necessary. An agreement that payment shall not be made without a compliance is equally effectual as a bar to the action. It is also said that it does not appear that she did not leave by consent of the company, or that she did not work as long as she agreed to. It is not agreed or proved that she did leave by its consent, or that she had agreed to work for a time specified, which had expired; and the burden of proof rests upon her to show that she left by permission, or that there was a special contract respecting the time during which she was to continue to labor.

The argument asserts that the regulations were not binding upon her, because the contract was not mutual; that the company could discharge her without giving her any notice.

The position is quite novel, that a contract will not be valid unless each party assumes precisely the same obligations.

It is further urged, if there must be a forfeiture of wages, it can extend to no more than the wages of two weeks. The contract contained in the regulations will not admit such a construction. There is no limitation of time during which she was

not to be settled with or paid, and the court is not at liberty to insert one. It was undoubtedly intended to operate upon all the wages earned subsequent to the last settlement, and such is its necessary effect.

It is moreover earnestly urged that the plaintiff may recover the ten cents allowed for board. It appears from the agreed statement that she was to receive "thirteen cents per piece" for weaving, and that "said company, in addition, allowed said Almeda ten cents for board." The sum allowed for board appears, therefore, to have been allowed as payment in part for her services for weaving.

Plaintiffs nonsuit.

TENNEY, WELLS, HOWARD, and APPLETON, JJ., concurred.

REGULATIONS OF EMPLOYERS, VALIDITY AND EFFECT OF.—Employers, especially those engaged in the business of manufacturing, often impose upon their employees regulations, such as that in the principal case, requiring a notice of a stipulated length of time of the intention of the employee to leave their service, and generally providing that in default of the notice the employee shall incur some forfeiture or penalty. No reason is apprehended why such a regulation should not be binding, if it can be shown to form a part of the employee's contract. And no case has held a stipulation of this sort void when it fulfilled the above requirements, and did not otherwise transgress the laws of the contract relation. *Per se* these regulations do not possess the taint of invalidity. They are not void for lack of mutuality, as was urged by counsel in the principal case, nor are they repugnant to public policy. Indeed, their scope and purpose is often, if not always, in a direction highly beneficial to manufacturing interests, liable as they are to the peril of strikes and uprisings among the employees. They are also not without an ultimate benefit to the laborer himself; for what makes the manufacturer more certain of his profit insures the laborer a greater certainty of his wages and of future employment. The employer's regulation requiring notice from his employee of intention is therefore not against public policy. But should the employer attempt to impose a regulation or stipulation against public policy, it would not, of course, be binding upon the employee, though he should agree to be bound by it, as in *Roesner v. Hermann, infra*.

CONTRACT WAIVING EMPLOYER'S LIABILITY FOR NEGLIGENCE IS VOID.—Therefore, in *Roesner v. Hermann*, 10 Biss. 486, it is held, that a contract between an employer and his employee, by which the employee, in consideration of his employment, releases and discharges his employer from all liability for damages for injury or death of the employee, resulting from the employer's negligence, is void, as against public policy.

WAGES ARE NOT FORFEITED UNLESS IT BE SO STIPULATED.—We now proceed to discuss the regulation requiring notice from the employee of intention to quit the employer's service. In the first place, as was decided in *Hunt v. Otis Co.*, 4 Met. 464, which is cited in the principal case, there will be no forfeiture of the employee's accrued wages by reason of such a regulation, unless the forfeiture is expressly stipulated in the regulation. But if the employee fail to give the requisite notice upon leaving the service he will be

liable to his employers for all damages caused by his not giving the notice, and in a suit against them for his wages the amount of such damages may be deducted therefrom. The hiring in the present case was for no definite period, so the employee could not be held to have forfeited his wages by reason of his having left before the completion of his agreement. The counsel for the employers, who were the defendants in the action, nevertheless attempted to evade the effect of the absence of the stipulation imposing forfeiture. "The counsel for the defendants ingeniously contends," say the court, "that this was a hiring for a certain time, commencing with the plaintiff's engagement with the company, and terminating in four weeks after notice given by her of her intention to finish the contract, and therefore, though uncertain as to length, is to be treated as certain, because capable of being rendered certain." And by means of this argument the counsel sought to bring the case within the rule that an express contract for the performance of work for a definite period of time must be fulfilled before the employee is entitled to compensation for his services. The court, however, did not sustain the counsel's view, but held that the contract was one "of indefinite and uncertain duration, terminable at the pleasure of the plaintiff, on giving four weeks' notice to quit. It wants two principal ingredients of the rule above mentioned—definiteness and certainty."

AMOUNT OF FORFEITURE SHOULD NOT BE EXCESSIVE.—The amount of forfeiture should not be an unreasonable and oppressive exaction. A forfeiture which covers all the wages due at the time of leaving is "open to the objection that the employer may have been in arrears, and thus enabled to profit by his own wrong. * * * It would not be reasonable to make the forfeiture cover a very long period." And where the workman is employed at piece-work, and not paid by fixed wages at given periods, the stipulated damages must be for some fixed amount or maximum: *Richardson v. Woeler*, 26 Mich. 90.

WHERE EMPLOYEE EMPLOYED BY WEEK IS TO FORFEIT ALL WAGES DUE in default of notice of intention to quit, if the wages of the workmen were ascertained on Thursday, but not paid till Saturday, a workman who has worked a week from Thursday till Thursday, but leaves on Friday, will forfeit the wages due: *Walsh v. Walley*, L. R., 9 Q. B., 367; see *Saunders v. Whittle*, 24 Week. Rep. 406; *Gregson v. Watson*, 34 L. T., N. S., 143.

WHAT NOTICE OR KNOWLEDGE OF REGULATION IS SUFFICIENT TO BIND EMPLOYEE.—If the employee be ignorant of the regulation of the company requiring a notice of his intention to quit he will not be liable in damages to the company for a breach of the rule: *Stevens v. Reeves*, 9 Pick. 198. In this case counsel for the plaintiff contended for the employee's liability, on the ground that such a regulation was a usage not only of the factory in which he was employed, but of factories in the vicinity. Of this argument, Parker, C. J., in delivering the opinion of the court, said: "In order to make this a part of the contract, as the usage supposed is a particular one, and not a general custom, it should have appeared that the defendant knew the usage when he entered upon the work or before he left it. This is required in order to give effect to a particular usage, so as to operate upon a contract. It is so with the usages of banks, and all other usages not of so general a nature as to furnish a presumption of knowledge. There is no such evidence in this case; on the contrary, it appears that the defendant was a stranger in the country, that he was not informed of any usage, and that no notice of it was posted up among the rules and orders of the factory:" *Id.* 200, 201; see also *Collins v. New England Iron Co.*, 115 Mass. 23. But where the employee

agrees to conform to the regulations of his employer commonly in use, he is bound to conform to a rule which the evidence shows existed in this and similar establishments: *Corsi v. Maretzek*, 4 E. D. Smith, 1. And a particular custom may be proved without direct evidence that it was known to the opposite party if the party offering the evidence contends that he can prove from all the evidence in the case that it must have been known to him: *Dodge v. Favor*, 15 Gray, 82. See also, on this subject of usage and custom, Woods on Master and Servant, sec. 95.

In the principal case, evidence that the employee continued to work after a printed copy of the regulations was delivered to him was held sufficient to show that he had agreed to them. But such evidence would not be conclusive. Thus in *Bradley v. Salmon Falls Mfg. Co.*, 30 N. H. 487, it is held that evidence that a party had in his possession a paper containing printed regulations of the manufactory in which he was employed as a laborer is not conclusive evidence that the contents were known to him. "Without doubt, it was evidence from which an inference might well have been drawn that the plaintiff did read the paper. But whether he did so or not was still, upon the evidence, an open question; and whether he could read or not was, as the judge who tried the cause correctly ruled, a question not of law but of fact." *Per Woods, C. J.* So the fact that the employee was informed of the rules after he commenced work, and continued to work without objection, may be competent evidence that he assented to the rules as a part of the contract; but it is open to explanation, and does not conclusively, as a matter of law, show such assent, and that he agreed to forfeit his wages if he left without notice: *Collins v. New England Iron Co.*, 115 Mass. 23.

SICKNESS AS EXCUSE FOR LACK OF NOTICE.—If the regulation be silent as to the employee's sickness as affecting the necessity of the notice, the employee will not be liable in damages, or to a forfeiture of wages in case of a failure to give notice, if his abandonment of the service was caused by his sickness: *Fuller v. Brown*, 11 Met. 440. Generally, the regulations make a special exception of such a case. But if the laborer expressly agree to send word to his overseer, even in case of sickness, stating the cause of his absence, or in default thereof to forfeit his wages, he will incur such a forfeiture if, when absent on account of sickness, but yet able to send the required notice, he fail to do so: *Noon v. Salisbury Mills*, 3 Allen, 340.

ARREST, CONVICTION, AND IMPRISONMENT FOR CRIME WILL EXONERATE a workman from the duty of giving to his employers two weeks' notice before leaving their service, under a contract by the terms of which he has agreed to give such notice or not claim any wages due. "The stipulation clearly had reference only to a voluntary abandonment of the defendant's employment, and not one caused *vi majeure*, whether by visitation of God or other controlling circumstances. It may be said that in the case at bar the commission of the offense for which the plaintiff was arrested was his voluntary act, and that the consequences which followed after it and led to his compulsory departure from the defendant's service are therefore to be regarded as bringing this case within the category of a voluntary abandonment of his employment. But the difficulty with this argument is, that it confounds remote and proximate causes. The same argument might be used in case of inability to continue in service, occasioned by sickness or severe bodily injury. * * * The true and reasonable rule * * * is this: To work a forfeiture of wages, the abandonment of the employer's service must be the direct voluntary act, or the natural and necessary consequence of some voluntary act, of the person employed, or the result of some act committed by him with a design to

terminate the contract or employment, or render its further prosecution impossible. But a forfeiture of wages is not incurred where the abandonment is immediately caused by acts or occurrences not foreseen or anticipated, over which the person employed had no control, and the natural and necessary consequence of which was not to cause the termination of the employment of a party under a contract for services or labor:" *Per* Bigelow, C. J., in *Hughes v. Wamsutta Mills*, 11 Allen, 201.

ABANDONMENT OF SERVICE, WHAT CONSTITUTES—MERE TEMPORARY ABSENCE NO ABANDONMENT.—Whenever the employee has not left his employer's service, he has not committed a breach of the regulation. The question whether he left his master's employ without notice, within the meaning of the regulation, is to be determined by evidence of his acts and declarations, but not of his undisclosed intentions: *Partington v. Wamsutta Mills*, 110 Mass. 467. These regulations do not have reference to a temporary absence. In case of a temporary absence without leave, the operative may properly be discharged, but there can be no forfeiture, under the agreement, of the wages then earned: *Heber v. United States Flax Manufacturing Co.*, 13 R. I. 303. In this case the court said: "A man does not quit the service of another when he merely takes a holiday without the other's consent. Still less does he quit the service if he only breaks off work for a day because he is sick. * * * A man does not know a fortnight beforehand when he is going to want a day on account of sickness or even for recreation, and therefore it is not to be supposed that the parties could have had any such transient intermission of service in mind when they stipulated for the fortnight's notice." The case at bar was distinguished from *Partington v. Wamsutta Mills*, 110 Mass. 467, *supra*, and *Naylor v. Fall River Iron Works Company*, 118 Id. 317, for the defendant's acts neither showed an intention to abandon the service, nor was he away so long as to warrant the master in regarding his absence as permanent. But if the employee is absent so long as to warrant the master in regarding his absence as an abandonment of his work, and in procuring another person to supply his place, he will forfeit his wages, although his intention was to be absent only temporarily: *Id.* An employee who obtains leave of absence, but remains longer than the permission allowed, can not be said to have abandoned his employer's service without notice, and for that reason to have forfeited his wages: *Taylor v. Carr*, 30 L. J. M. C. 201.

OTHER CONTRACTS INVOLVING FORFEITURE OF WAGES.—"Entire satisfaction" is to be construed as "reasonable satisfaction" in some cases. One who agreed to work under an agreement by which a part of his wages were kept back until the contract was fulfilled to the entire satisfaction of the defendants, having been discharged without other cause, is entitled to the wages retained, notwithstanding the defendants contend that his work was unsatisfactory. "The provision that the fund is to be held by the defendants until the contract is fulfilled to their entire satisfaction must be construed to mean their reasonable satisfaction. Thus construed, it is consistent with the former provision of the same clause, by which the fund is made security merely, to protect the defendants against any damages to them by a breach of the contract by the plaintiff. Any other construction would allow the defendants unreasonably to deprive the plaintiff of the wages when he had in good faith fully performed the contract, and to treat the fund as liable to forfeiture, at their caprice. We can not think that this was the intention of the parties:" *Sloan v. Hayden*, 110 Mass. 141. A condonation by the employer of one offense which might have involved a forfeiture of wages is no waiver of his

right upon a repetition of the offense. Thus in *Hunter v. Gibson*, 3 Rich. 161, the plaintiff agreed to abstain entirely from all intoxication, and to forfeit his wages if he got drunk and was dismissed. Although the plaintiff got drunk repeatedly, the failure of the defendant to discharge him upon the first occasion was no waiver of the agreement, and when afterwards discharged for this cause, the plaintiff could not recover on a *quantum meruit* for the time he had labored.

STIPULATION BY EMPLOYER TO GIVE EMPLOYEE NOTICE OF INTENT TO DISCHARGE.—Agreements of this sort are sometimes entered into. In an action for damages by an employee for being dismissed without the required notice, the employer may show that the plaintiff was unfit to render service by reason of the use of opiates and an unsound mental condition. "The contract on her part implied some capability of performing the duties she had assumed, of rendering some service. If she could render none, defendant was not bound to continue it even for the thirty days which the termination of it by notice required:" *Lyon v. Pollard*, 20 Wall. 403. In reference to damages caused by the employee's discharge without the stipulated notice, the employer may show that part of the notice was given, and that the employee had only fifteen days to remain, and was injured only to that extent: *Id.* After a notice has once been given and withdrawn, a new notice may be given, which will be effectual after the requisite time has expired: *Id.* When hired from month to month, if dismissed for good cause during the middle of a month, but without the stipulated notice, the employee can not recover for the part of the month during which he has labored: *Searle v. Ridley*, 28 L. T., N. S., 411. There could be only damages for an improper discharge. *Per Blackburn, J.* A contract "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice," was held to be a contract for a year's service, terminated at the close of the year, and the stipulation for notice applied only in case the engagement was prolonged beyond the twelve months: *Langton v. Carleton*, L. R., 9 Ex., 57.

AFTER DUE NOTICE GIVEN, ACTION FOR WAGES LIES IMMEDIATELY. In a contract for a year's service it was stipulated that either party might discontinue the contract upon giving a certain notice. The employee left the service after having given the required notice, and was allowed to sustain an action immediately for his services, without waiting for the expiration of the year: *Rossiter v. Cooper*, 23 Vt. 522.

STATE v. REED.

[35 MAINE, 489.]

USE OF ARABIC NUMERALS AND LONG-USED AND WELL-UNDERSTOOD ABBREVIATIONS to express time in complaint for crime is not fatal to the complaint.

ALLEGATION THAT DEFENDANT "ON THE 14TH DAY OF DECEMBER, A. D. 1850," was guilty of the acts complained of does not render the complaint invalid because of the use of figures and abbreviations.

COMPLAINT for selling without authority to a certain named person a specified quantity of spirituous liquor. The verdict

was against the defendant, and his motion in arrest of judgment being overruled, he excepted. The opinion states the case.

Tallman, attorney general, for the state.

Merrill, for the defendant.

By Court, TENNEY, J. The exceptions are attempted to be sustained on the ground that the time when the complaint was made is stated therein to be "on the 16th day of December, A. D. 1850," and that it is alleged in the complaint that the defendant, "on the 14th day of December, A. D. 1850," was guilty of the acts complained of; and it is contended that the use of figures and abbreviations in the complaint renders it invalid.

In all criminal prosecutions the accused shall have a right to demand the nature and cause of the accusation; and he shall not be deprived of his life, liberty, property, or privileges but by the law of the land: Constitution of Maine, art. 1, sec. 6.

The use of Arabic numeral characters has been long adopted in contracts and other documents, and no want of certainty is perceived to be the result. And the nature and cause of a criminal complaint is not rendered obscure in any degree by reason of dates being in those characters. Such abbreviations as occur in the complaint which we are considering have been for a long time used, and their meaning is as well understood as if the words which they represent were written at length.

It has not been satisfactorily shown that a complaint containing dates in numerical characters, and the abbreviations of "A. D." for "the year of our Lord," fails to be according to the law of the land. The statutes of England, which have been cited for the purpose of showing the complaint defective, are not such as are binding authority here. The act of 4 Geo. II., c. 14, and 6 Geo. II., c. 26, we are not satisfied has ever been adopted as a part of the common law of this country.

In several states of the Union, dates like those in question have been held sufficient: *State v. Hodgeden*, 3 Vt. 481; *State v. Raiford*, 7 Port. 101; *Barnes v. State*, 5 Yerg. 186; *State v. Haddock*, 2 Hawks, 461. In other cases they have been regarded as insufficient at common law, though they have sometimes been held valid under statutory provisions: *State v. Dickens*, 1 Hayw. 406; *State v. Lane*, 4 Ired. L. 114; *Finch v. State*, 6 Blackf. 533.

The practice which has prevailed in this respect, it is believed, has not been uniform even in this state, and authority is not so clear as to warrant the decision that a complaint for such a cause is essentially defective, though we think it would be better

for criminal pleaders to adhere to the ancient practice which has generally been adopted, to frame complaints exclusively in the English language.

Exceptions overruled.

SHEPLEY, C. J., and WELLS and HOWARD, JJ., concurred.

ABBREVIATIONS OF PROPER NAMES OF PERSONS described in indictment are allowable: *State v. Kean*, 34 Am. Dec. 162.

USE OF ARABIC NUMERALS IN STATING TIME IN COMPLAINT for commission of an offense does not vitiate the complaint. The principal case is cited to this effect in *Commonwealth v. Hagarman*, 10 Allen, 402.

WILLIAMS v. HILTON.

[35 MAINE, 547.]

SURVIVING MORTGAGEE MAY MAINTAIN WRIT OF ENTRY TO FORECLOSE MORTGAGE.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW NOTE PRODUCED IN EVIDENCE to be the one secured by a mortgage, when it corresponds in some but not in all respects with that described in the condition in the mortgage.

NOTE PAYABLE TO A. MAY BE SHOWN BY PAROL to be one of the notes described in a mortgage as given to A. and B., its date and amount corresponding with the description in the mortgage.

TAXES LEGALLY ASSESSED UPON ESTATE CREATE LIEN THEREON, and lay foundation for a title paramount to that derived by deed or mortgage.

TAXES LEGALLY ASSESSED CONSTITUTE LEGAL CHARGE, NOT UPON MORTGAGE, but upon the estate.

TAXES LEGALLY ASSESSED UPON MORTGAGED PREMISES should be discharged by the mortgagor and those claiming under him while they are in possession.

TAXES ON MORTGAGED PREMISES PAID BY MORTGAGEE may be included in conditional judgment in his favor.

MORTGAGOR IS ESTOPPED FROM CONTENDING THAT TAXES PAID BY MORTGAGEE were illegal, unless he has notified the mortgagee of the illegality, and indemnified him against the loss of his rights under the mortgage, in case the final result of a contest of the tax should be in favor of the validity of a tax title.

TAXES PAID BY MORTGAGEE UPON OTHER PREMISES THAN THOSE INCLUDED IN MORTGAGE may be included in conditional judgment against the mortgagor, when the taxes paid were assessed upon the whole estate of the mortgagor without distinction between the mortgaged and unmortgaged property, since it was the mortgagor's duty to render the assessors a distinct description of the mortgaged premises, and thus enable the mortgagee to tender the amount assessed upon the mortgaged premises alone.

RIGHTS OF PARTIES IN ASCERTAINING AMOUNT FOR WHICH CONDITIONAL JUDGMENT shall be rendered in writ of entry by the mortgagee upon a

mortgage, as regulated by the Maine statute, must be determined upon the same principles that would control were the mortgagor to bring his bill in equity to redeem the premises from the mortgagee.

TO REDEEM ESTATE FROM MORTGAGE, MORTGAGOR MUST PAY SUCH ADDITIONAL SUMS as the mortgagee has been compelled to pay to protect the estate from forfeiture in consequence of the laches of the mortgagor.

WRIT of entry on a mortgage. The case came up on report from *nisi prius*. The opinion states the case.

Cutting, for the demandant.

Stewart, for the tenant.

By Court, RICE, J. The tenant has submitted to a default. The demandant now claims to be entitled to an unconditional judgment for possession of the demanded premises. At the trial, as the case finds, the demandant introduced a deed of mortgage from Purinton to Winthrop & Williams, and also a tax title covering the premises described in the mortgage, with other territory not included therein.

Subsequently the plaintiff abandoned his tax title, withdrew all records and proceedings tending to establish the same, except the treasurer's receipts, and elected to rely upon his mortgage and the notes alone, and claimed that the taxes paid should be included in the conditional judgment.

It is quite apparent that when this report was drawn, the parties understood that the demandant should have a conditional judgment only, if entitled to recover. By the provisions of chapter 104 of statute of 1844, the judgment must be conditional. The only questions, therefore, open for the consideration of the court are, whether the plaintiff is entitled to maintain his action, and if so, for what amount shall the conditional judgment be entered.

That Thomas L. Winthrop has deceased, and that the plaintiff Williams is surviving mortgagee, sufficiently appears from the evidence in the case. The action is therefore properly in court.

The demandant claims that the conditional judgment shall include the amount of the two notes produced at the trial, and the further sum of one hundred and sixty dollars and thirty-five cents, paid by him for taxes on the demanded premises, with interest thereon. The tenant contends that judgment should go for the amount of the last note described in the mortgage, and no more, excluding the note for sixty-six dollars, payable to Thomas L. Winthrop, and the amount paid by the demandant for taxes.

The mortgage was made by James Purinton, running to Thomas L. Winthrop and Reuel Williams, and provides: "That if the said James Purinton, his heirs, executors, or administrators, pay to the said Winthrop & Williams, their heirs, executors, administrators, or assigns, the sum of four hundred dollars in one, two, three, four, five, and six years, according to his six notes therefor, then this deed, as also said six notes bearing even date with these presents, given by the said Purinton to the said Winthrop & Williams, promising to pay the same sum and interest, at the times aforesaid, shall be void, otherwise shall remain in full force."

The note to which objection is made corresponds in all respects with the notes admitted to be secured by the mortgage, excepting that it is payable to "Thomas L. Winthrop" instead of "Thomas L. Winthrop and Reuel Williams." To prove that this was one of the notes given by Purinton to Winthrop & Williams, and constituted a part of the four hundred dollars secured by the mortgage, the deposition of Daniel Williams, the attorney who drew and witnessed both the mortgage and the notes, was introduced.

From that testimony, if legally admissible, taken in connection with the papers presented, it satisfactorily appears that the note was given at the time the mortgage was executed and constitutes a part of the four hundred dollars secured therein.

The objection to the introduction of this parol testimony is that it contradicts the deed.

The material part of the deed is the provision securing the payment of four hundred dollars. This is the substance of the contract. The production and proof of the deed, in the absence of all other evidence, would have entitled the plaintiff to judgment: *Thompson v. Watson*, 14 Me. 316; 2 Greenl. Ev., sec. 329; 4 Phill. Ev. 309. The mortgage contains no stipulation for the payment of the notes, but does provide that on the payment of the four hundred dollars, the notes described, which were given to Winthrop & Williams, as well as the deed, shall be void.

Whether the plaintiff, after having proved his deed, was under the necessity of proceeding further, may admit of doubt. The most he could be required to do, if indeed that burden was on him, was to prove the amount that then remained due. The note objected to was introduced as evidence to show in part that amount. Is it one of the notes "given by the said Purinton to the said Winthrop & Williams" which is to become void on

the payment of the four hundred dollars secured by the mortgage? Its date and amount correspond precisely with the description in the mortgage, and unless the word "given" is constructed to mean "payable," there is no variance whatever. "To give" ordinarily means to deliver, to transfer, to put into one's possession, to make over to another. If such be the legitimate meaning of the word as used in the deed, then under the common and universally recognized rules of evidence, parol testimony is admissible to identify the note and apply it to the mortgage.

But if the other construction be adopted, and the word "given" be deemed tantamount to "payable," then the case falls clearly within the principle adopted by this court in *Bourne v. Littlefield*, 29 Me. 302, and affirmed in *Sweetser v. Lowell*, 33 Id. 446, wherein it is held that parol evidence is admissible to show a note produced in evidence to be the one secured by a mortgage, when it does not correspond in all respects with that described in the condition in the mortgage. The amount of this note must therefore be included in the conditional judgment.

Against including in the judgment the amount the demandant has paid for taxes, the defendant has produced numerous objections, each and all of which he deems fatal. In the view we have taken of this branch of the case, it will not be necessary to consider those specific objections in detail.

The mortgage under which the demandant claims covers the east half of No. 17, and the west half of No. 16, in the first range of lots according to Weston's plan of the town of Newport. The taxes paid by the demandant, and which he now claims to have included in his judgment, were assessed upon the premises covered by the mortgage and upon the east half of No. 16, and the buildings thereon, to wit, a house, two barns, and a shed. The east half of No. 16, on which the buildings stand, is not covered by the mortgage. What portion of the taxes paid were assessed upon said east half of No. 16, and the buildings thereon, does not appear.

Taxes legally assessed upon an estate create a lien thereon, and lay the foundation for a title paramount to that derived by deed or mortgage. They constitute a legal charge upon the estate, not upon the mortgagee: *Faure v. Winans*, Hopk. Ch. 283 [14 Am. Dec. 545]. It was the duty of the mortgagor and those holding under him to discharge all taxes thus assessed upon the demanded premises, while they withheld the possession from the mortgagee, and in case taxes were assessed in a manner

which they deemed illegal, notice of this fact should have been given to the mortgagee, and in case payment was to be resisted, he should be indemnified against loss, because it would be unreasonable to subject the mortgagee to the hazard of contesting the legality of a tax title by a suit at law, in which, if the final result should be in favor of the validity of that title, all his rights under his mortgage would be forever lost.

But it is further contended that the taxes can not be included in the conditional judgment, because only a part of the amount paid was assessed upon the estate included in the mortgage, and that under the provision of section 51 of chapter 14, revised statutes, the demandant should have tendered the amount assessed upon the mortgaged premises only, and thus discharge the tax lien by a much smaller sum than was actually paid.

The answer to this position is, that the whole estate of those claiming under the mortgagor was assessed together, no distinction being made between that which was and that which was not included in the mortgage. There were therefore no *data* furnished by which the amount assessed upon the mortgaged premises could be determined and the amount to be tendered ascertained. This was the fault of the mortgagor. To entitle himself to the benefit he now claims, he should have rendered to the assessors a distinct description of that part of the estate covered by the mortgage, and thus have furnished a basis upon which a tender could have been made. This he has not done.

This form of action as now regulated by statute approximates very closely to a process in equity for the redemption of mortgaged property, and the rights of the parties in ascertaining the amount for which a conditional judgment shall be rendered must be determined upon the same principles that would control were the mortgagor to bring his bill in equity to redeem the premises from the mortgagee. In that case the mortgagor would be required to pay not only the sums directly secured by the mortgage, but also such additional sums as the mortgagee had been compelled to pay to protect the estate from forfeiture in consequence of the laches of the mortgagor.

According to the agreement of the parties, the default is to stand, and a conditional judgment is to be entered for the amount of the two notes produced in evidence at the trial, and which are attached to the deposition of the witness Williams, and also for the amount paid for taxes, with interest thereon from the time of payment, with costs for the demandant.

SHEPLEY, C. J., and WELLS, HATHAWAY, and APPLETON, JJ., concurred.

MORTGAGES, WHERE TAXABLE: See note to *New Albany v. Meekin*, 56 Am. Dec. 529.

TAXES PAID ON MORTGAGED PREMISES ARE LEGAL CHARGE AGAINST MORTGAGE ESTATE, even in the absence of an agreement: *Faure v. Winans*, 14 Am. Dec. 545.

PAROL EVIDENCE TO IDENTIFY NOTE SECURED BY MORTGAGE.—In *Paine v. Benton*, 32 Wis. 497, the court, *per* Dixon, C. J., says: "It is well settled, where the note agrees in some respects with that described in the mortgage, though it differs in others, that it may be proved by parol to be the note intended to be described in the mortgage;" and cites in support of that proposition the principal case and other cases.

MORTGAGEE MAY ADD TO AMOUNT OF MORTGAGE sum paid to buy up tax title in order to protect his title under the mortgage. The principal case is cited to this proposition in *Skilton v. Roberts*, 129 Mass. 309. But that case held that the mortgagee could not recover sums paid to redeem tax titles after the sale under the mortgage.

GAY v. WALKER.

[36 MAINE, 54.]

RESERVATION CAN NOT BE REGARDED AS REPUGNANT AND VOID when the grantee, if it be permitted to be effectual, may acquire a valuable interest in the thing granted.

OWNER CONVEYING LAND MAY RESERVE FREE FLOW OF LIGHT AND AIR over it without obstruction; and such reservation is good as something not in the sense of the law before existing, but derived from the thing granted.

STIPULATION IN GRANT THAT LAND IS TO BE "COMMON AND UNOCCUPIED" is valid where the grantee owns adjoining land which would be materially benefited if the land granted remained open; and in such a case the grantor may maintain an action against a lessee of the grantee for erecting a building on the land.

RESERVATION TO BE GOOD MUST BE MADE TO GRANTOR; it is not the less made to him if it be so made that others can derive advantage from it; it will be considered as made to him when valuable rights are secured to him, although others may be benefited by it.

CASE. The opinion states the case.

Ruggles and Gould, for the plaintiff.

M. H. Smith and Stevens, contra.

By Court, SHEPLEY, C. J. The plaintiff, on May 30, 1835, conveyed to Walter E. Tolman a small lot of land opposite to his store and dwelling-house. Following the description and preceding the *habendum*, the deed contained these words: "The said land is to be common and unoccupied." The defendant,

being the lessee of those deriving title from the grantee, has erected a building upon the lot and occupied it as a store.

It is not difficult to perceive that the intention of the parties by the use of those words was to explain and qualify the grant in such manner that the land should remain unoccupied in any other manner than commons or squares are usually occupied in villages for the enjoyment of light, air, and free passage.

It is insisted that effect can not be given to the language without a violation of established rules of law, either as a reservation, an exception, or a covenant. That it can not be regarded as a reservation, because a reservation can not be made of a part of the thing granted or of anything repugnant to it, but must be of something not in being and created out of the thing granted.

There will not be found anything repugnant to or destructive of the grant if it be regarded as thus qualified; for the grantee will not necessarily be deprived of essential benefit from it. He appears to have been the owner of another lot of land separated from this only by a private and narrow way, the value of which might be materially increased by having this remain unoccupied, so that there might be over the whole of this lot free access to that without any obstruction to prevent its being open to the sight of passengers in the adjoining streets. His other lot appears to have been so situated that it might afterwards be expected to be used for the erection of buildings upon it for the purposes of trade. The rent of such buildings might be expected to be so increased by having this lot remain occupied only as a common, that it would more than compensate the grantee for the amount paid to purchase it. A reservation can not be regarded as repugnant and void when the grantee, if it be permitted to be effectual, may acquire a valuable interest in the thing granted.

Nor can it in this case be considered void because it does not reserve something not in being and newly derived from the thing granted.

A right of way over land conveyed may be reserved; and yet the grantor would have had the same right to pass over his land before the conveyance, but it would not have existed as a thing separate from the land; and when the land is granted and the right of way is reserved, that right of way becomes in the sense of the law a new thing derived from the land.

The owner of land not covered by any erections made upon it may have a free flow of light and air over it to his dwelling-

house built upon adjoining land, and he may convey it and reserve the same flow of light and air over it without obstruction, and such reservation may be good as something not in the sense of the law before existing, but derived from the thing granted.

The provision contained in this deed is, in substance, one which secures to the grantor the free flow of light and air over the land granted to his dwelling-house and store, and an unobstructed view of them and of his other lands by those traveling in the adjoining streets, as well as an unobstructed view of his lime-kilns from his dwelling-house and store. He had these privileges while he was the owner of the land conveyed, yet when they were separated from it, they had as a separate matter a new existence.

A reservation to be good must also be made to the grantor. It is not the less made to him if it be so made that others can derive advantage from it. It will be considered as made to him when valuable rights are secured to him, although it may be perceived, that others may also be benefited by it. It is admitted that the plaintiff has suffered injury by a violation of that provision in the deed.

Defendant defaulted.

WELLS, HOWARD, RICE, and HATHAWAY, JJ., concurred.

RESERVATIONS IN DEEDS: See *Dyer v. Sanford*, 43 Am. Dec. 399; *Pyncheon v. Stearns*, 45 Id. 210, and note; *Wadsworth v. Smith*, 26 Id. 525; *Brown v. Meady*, 25 Id. 248.

COVENANT NOT TO ERECT BUILDING ON LAND GRANTED: See *Watertown v. Cowen*, 27 Am. Dec. 80; also *Atkins v. Bordman*, 37 Id. 100.

MCLELLAN v. COX.

[36 MAINE, 95.]

PART OWNERS OF DISTINCT FRACTIONAL PORTIONS OF VESSEL ARE TENANTS IN COMMON of the vessel.

MASTER MAY BIND OWNERS FOR NECESSARY SUPPLIES AND REPAIRS of their vessel, when he is their agent, but he can not bind them where no agency, express or implied, exists.

MASTER HIRING VESSEL ON SHARES, and having the sole control and management of her, and sailing, victualing, and manning her on his own account, is the owner *pro hac vice*, and has no agency or authority from the general owners to furnish her with supplies, and can not bind the owners for them.

UNAUTHORIZED ADMISSIONS OF ONE PART OWNER OF VESSEL ARE NOT BINDING upon the co-owners.

ASSUMPSIT against the owners of the brig Ellen Maria for supplies furnished her and delivered to the master, Captain Hoyt. The owners defended on the ground that Captain Hoyt was managing the brig on shares, and had control and management of her. The material facts are stated in the opinion. Verdict for the defendants. The plaintiff excepted and moved for a new trial.

Gilbert, for the plaintiff.

Fuller and Edwards, contra.

By Court, HOWARD, J. It is admitted that the defendants were the general owners of the vessel when the supplies were furnished for which this suit is brought. It appears that they were part owners of distinct fractional portions, respectively; and there is no evidence that they sustained any relation to each other excepting that of ship-owners generally. Upon well-settled principles, they were tenants in common of the vessel: Abbott on Ship. 68; Collyer on Part., secs. 1185, 1187; 3 Kent's Com. 39, 40, 151; Story on Part., sec. 417, and notes and cases referred to by those authors.

When the master is agent of the owners, he may bind them for the necessary supplies and repairs of their vessel, but not so where no agency, express or implied, exists. There was evidence in this case tending to show that Hoyt, the master, hired the defendants' vessel "on shares;" that he had the possession and sole control and management of her, and sailed, victualed, and manned her on his own account; and that he was owner *pro hac vice*. The whole evidence was submitted to a jury, with instructions not appearing to be objectionable, and the verdict, which was for the defendants, we can not regard as unauthorized. As owner *pro hac vice*, the master, having no agency or authority from the general owners, would be answerable for the necessary supplies procured by himself: 3 Kent's Com. 137, 138; *Webb v. Pierce*, 5 Law Rep., N. S., 9, U. S. Circuit Court, District of Massachusetts, and the cases there cited, English and American, showing the law on this subject to be well settled in both countries; *Lyman v. Redman*, 23 Me. 289.

But the plaintiff insists that the liability of all the defendants was established by proof of the admissions of one of them to that effect. There is no proof, however, that they were in partnership, enjoying the rights and powers or subject to the duties and obligations of partners, in respect to the vessel, her possession, transfer, control, and management, or liability for debts

or forfeitures. While ship-owners may be in partnership as owners, their general relation is that of tenants in common, and their partnership relation, though provable, can not be presumed from the fact of being part owners. They are not agents for each other, unless made such upon authority conferred for that purpose, expressly or by implication. Their acts are not binding upon each other without such special authority; nor can the unauthorized admissions of one implicate or bind the others: Collyer on Part., sec. 1229, and notes; Story on Part. 453; *Hardy v. Sproule*, 31 Me. 71. Where two were partners, and also part owners of a vessel, the admission of one, as to the subject of part ownership, but not of the copartnership, was held not to be binding on the other, by Lord Ellenborough: *Jaggers v. Binnings*, 1 Stark. 64; Smith's Merc. L. 187; *Dan v. Brown*, 4 Cow. 483 [15 Am. Dec. 395]. So the admission of one tenant in common of real or personal property, as such, will not bind his co-tenants.

There was no joint interest shown between the defendants, although a community of interest appeared to exist between them as part owners of the vessel. The admissions of Cox, one of the defendants, could not, therefore, bind the others: 1 Greenl. Ev., secs. 176, 177.

Exceptions and motion overruled.

SHEPLEY, C. J., and RICE and HATHAWAY, JJ., concurred.

PART OWNERS OF VESSELS, HOW REGARDED: See *Hopkins v. Forsyth*, 53 Am. Dec. 513, and note; *Knox v. Campbell*, 44 Id. 139.

MASTER'S AUTHORITY TO PURCHASE SUPPLIES FOR VESSEL: See *Calef v. Steamer Bonaparte*, 38 Am. Dec. 190; *Duff v. Bayard*, 39 Id. 73, and note; *Newhall v. Dunlap*, 31 Id. 45.

MASTER WHO SAILS VESSELS ON SHARES, and not the general owners, is liable to the shipper for the value of part of the cargo which was used for fuel during the voyage: *Sproat v. Donnell*, 45 Am. Dec. 103.

MOSES v. NORTON.

[36 MAINE, 113.]

VERBAL PROMISE TO PAY RENT OF PREMISES OCCUPIED BY PROMISOR'S MOTHER is void under the statute of frauds, where the mother entered the house at an agreed rental, and the plaintiff, being solicitous about the rent, mentioned the matter to the defendant, who verbally promised to pay the rent during the time she should occupy the house; in such a case the defendant can be regarded only as a guarantor, and not as an original promisor.

ASSUMPSIT on an agreed case for the rental of a house occupied by defendants' mother. The mother had entered the house at a stipulated rental, and after she had occupied the premises some time, the plaintiffs, being solicitous about their rent, mentioned the matter to the defendants, who orally promised to pay the rent as long as the mother occupied the house. This action was brought on this promise for the rent.

Randall and Booker, for the plaintiffs.

Clapp and Baker, contra.

By Court, APPLETON, J. From the facts as agreed upon by the parties, there can be no question but that the plaintiffs might have successfully maintained an action against Mrs. Norton, the mother of the defendants, for the rent of the premises belonging to them, during her occupation of the same. She had entered their house under an agreed rent of sixty dollars a year, and was occupying the same at the time of the promises of the defendants, which are relied upon to sustain this suit. That lease was then in full force, and there is no evidence whatever of its termination. Mrs. Norton was in no way relieved from her liability to the plaintiffs, and by continuing to occupy it she still remained liable. It is difficult to perceive what defense she could have made to any suit brought to recover the rent due.

Mrs. Norton must be regarded as the principal debtor, and the liability of the defendants as collateral thereto, and consequently as within the statute of frauds, R. S., c. 136, sec. 1, which requires the promise "to answer for the debt, default, or misdoings of another to be in writing."

In *Blake v. Parlin*, 22 Me. 397, the son of the defendant leased the house of the plaintiff, and it appeared that while he was moving into the same, the plaintiff called on her and told her they should not go in unless she would be accountable for the rent, and that she verbally promised the same should be paid. But this, being a parol promise to pay the debt of another, and not in writing, was held void under the statute. In *Thomas v. Williams*, 10 Barn. & Cress. 664, Lord Tenterden, C. J., held that a promise to pay the accruing rent of the tenant was "nothing more than a promise to pay money that would become due from a third person," and was "within the words of the statute, and the mischief intended to be remedied thereby." The test in all cases under the statute is, whether the party promising is an original debtor or not. The defendants can only be regarded

as guarantors: *Tileston v. Nettleton*, 6 Pick. 509; *Tomlinson v. Gell*, 6 Ad. & El. 564; *Barber v. Fox*, 1 Stark. 270.

Plaintiff nonsuit.

SHEPLEY, C. J., and TENNEY, RICE, and CUTTING, JJ., concurred.

AGREEMENT TO PAY DEBT OF ANOTHER MUST BE IN WRITING: *Taylor v. Drake*, 53 Am. Dec. 680, and note.

STEVENS v. MCNAMARA.

[36 MAINE, 176.]

ONE KNOWINGLY AND DESIGNEDLY INDUCING ANOTHER TO PURCHASE ESTATE for a valuable consideration of a third person can not set up a prior and better title in himself to defeat the title of the purchaser.

ONE WHO INDUCES ANOTHER TO REDEEM PROPERTY SOLD ON EXECUTION against himself, and to take a deed for the same, is estopped to set up a prior and better title to the land.

CONTINUANCE OF LIFE TO COMMON AGE IS PRESUMED, and the burden of proof lies upon the party alleging the death; but after an absence from his home or place of residence seven years, without intelligence respecting him, the presumption of life will cease, and it is incumbent on the party asserting it to prove that the person was living within that time.

WRIT of entry for two pieces of land adjoining each other and making one lot. The opinion states the case.

Paine, for the demandant.

Lancaster and Baker, contra.

By Court, HOWARD, J. The demandant acquired title to a portion of the premises demanded, in 1823, and conveyed it to his son, Jonathan Stevens, in 1825. The remaining portion was conveyed to the demandant in 1827; and subsequently, in 1842, the whole was sold for taxes by a collector, and conveyed by him to the purchaser. In 1845 a daughter of the demandant, who is now one of the tenants and wife of the other, paid the money to the purchaser, in amount sufficient, as it would seem, to redeem the estate from the sale for taxes, and took a deed of the premises to herself. This was done by the request of the demandant, in his presence and under his direction.

As to that portion of the estate which was owned by the demandant when the sale for taxes took place, he is estopped by his own acts, *in pais*, to set up a title in himself as existing when the conveyance was made, by which the tenants now

claim. He is concluded upon the principle that one shall not knowingly and designedly induce another to purchase an estate for a valuable consideration of a third party, and then set up a prior and better title in himself to defeat the title of the purchaser. This principle of equity, it is held, has been adopted at law, and the cases cited from English and American decisions, in *Copeland v. Copeland*, 28 Me. 539, 540, appear to sustain the doctrine: *Rangely v. Spring*, Id. 135, opinion of Whitman, C. J.

But the estoppel can not apply to the title which the demandant claims to have acquired since the conveyance to his daughter. To that portion of the estate owned by Jonathan Stevens, when sold for taxes, that sale conveyed no title as against the owner, the proceedings necessary to support the sale not having been shown to be legal. To that portion the demandant now asserts title, as father and sole heir to Jonathan Stevens. The death of the latter, since 1843, has not been shown, but it is contended that it must be presumed from facts appearing in evidence. Ordinarily, in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man will be assumed by presumption of law. The burden of proof lies upon the party alleging the death of the person; but after an absence from his home or place of residence seven years without intelligence respecting him, the presumption of life will cease, and it will be incumbent on the other party asserting it to prove that the person was living within that time: 2 Stark. Ev. 365; 1 Greenl. Ev., sec. 41, and cases cited.

But the demandant can not invoke this principle to his aid; for upon a careful examination of the testimony, it does not appear that Jonathan Stevens had been absent from Hallowell, in this state, seven years before the commencement of this action, and whether his residence be regarded as there or in Philadelphia is immaterial. Hiram B. Stevens testified that Jonathan, after an absence of fourteen years, went to Hallowell in November, 1843, about the ninth day of the month, and staid there "near a week, but can't say just how long." Winter testified that Jonathan staid "when last here five or six days in 1843." Benjamin Stevens, a brother of Jonathan, testified that "he was in Hallowell in November, 1843, and staid about a month." The writ of the demandant is dated November 18, 1850. It is not proved, therefore, and we can not assume, that Jonathan Stevens had been absent from Hallowell, the residence of his father, brothers, and sister, and his home formerly,

at least seven years before this suit was commenced; and we can not lawfully presume that he was not then living. Consequently the demandant's claim to that portion of the premises which was conveyed by him to Jonathan Stevens is not maintained. As he must stand upon his own title, and that proving insufficient to support his action, he must become nonsuit, according to the agreement.

SHEPLEY, C. J., and WELLS, RICE, and HATHAWAY, JJ., concurred.

ESTOPPEL OF OWNER OF LAND FROM SETTING UP TITLE where he acquiesces in or invites its disposition to another: See *Godeffroy v. Caldwell*, 58 Am. Dec. 360, and cases cited in the note. See also *Cowles v. Bacon*, Id. 371.

PRESUMPTION OF DEATH FROM ABSENCE: See *State ex rel. Spencer v. Moore*, 53 Am. Dec. 401, and note. The principal case was cited on the point that a person who had gone to sea and been absent sixteen years, and had never been heard from, was presumed to have been dead for nine years: *Rockland v. Morrill*, 71 Me. 457; and referred to in *Wentworth v. Wentworth*, Id. 74, on the position that mere failure to hear from an absent person for seven years, who was known to have a fixed place of residence abroad, would not be sufficient to raise the presumption of his death, unless due inquiry had been made at such place without getting tidings of him.

WILLIAMS v. ANDROSCOGGIN AND KENNEBEC R. R. COMPANY.

[36 MAINE, 201.]

RIGHTS OF PARTIES ON GARNISHMENT DEPEND UPON CONDITION OF THINGS AS EXISTING at the time of the service of the original writ on the trustees, and can not be modified or changed by subsequent transactions.

AMOUNT TO BE PAID ON CONTINGENCY that certain work contracted to be done by the defendant will be well performed can not be garnished in an action against the defendant before the work was performed.

ON GARNISHMENT OF FUND BY SEVERAL CREDITORS, the fund must be appropriated to satisfy the judgments according to priority of attachments.

GARNISHMENT OF AMOUNT DUE DEFENDANT FOR WORK IS PREMATURE when made before the work is completed.

GARNISHEES ARE LIABLE TO PAY INTEREST on the amount in their hands for which they are charged from and after the day on which the demand of payment was made upon them.

THE questions in this case are whether a sum payable to one on the contingency that certain work he is performing is well done can be garnished before the work is completed; also, whether the amount to be due for work can be garnished before the work is completed. There was also a question as to the

priority between attaching creditors. The facts which were agreed are stated in the opinion.

Bean, for the plaintiff.

H. W. Paine, contra.

By Court, RICE, J. The defendants were summoned as trustees of Porter & Benson, in an action which was entered at the April term of the late district court, Kennebec county, 1849, and disclosed, and upon that disclosure were charged.

In that action judgment was obtained against the principal defendants, and it is admitted that all the proceedings required by the statute were had to fix the liability of the trustees.

The indebtedness of the trustees to the principal defendants in the original action was incurred under a contract for executing the grading and masonry on three sections of the Androscoggin and Kennebec railroad.

That contract contains a provision that "between the first and tenth day of each month, after the commencement of the work, the engineer (employed by the company) shall estimate the quantity of the work done, and shall give a certificate of the same; and upon the presentation of said certificate to the treasurer of said company, three fourths of the amount then due for work specified in said certificate shall be paid to the party of the first part, as aforesaid; provided, however, that no estimate shall be made or certificate given within one month after the commencement of the work; and provided, also, that no certificate for a less sum than five hundred dollars shall be given, except at the discretion of the engineer; and when the whole work hereby contracted for shall have been accepted agreeably to contract, the balance shall be paid to the said party of the first part."

It was manifestly the intention of the parties that monthly estimates should be made of the work performed and payment made for three fourths the amount thereof, on presentation of the engineer's certificate. The amount thus found was due absolutely, and depended upon no contingency. There was nothing due and payable until the expiration of each month, and whether the one fourth which was reserved should ever become payable depended upon the contingency of the contract being fully performed; for it was stipulated that if the parties of the first part should not well and truly perform all their covenants, "any balance for work done on said road, which would have

been due to said party of the first part, shall be forfeited and become the right and property of the company."

The rights of the parties depend upon the condition of things as they existed at the time of the service of the original writ on the trustees, and could not be modified or changed by subsequent transactions. The fact that the contract was finally completed can not therefore change the result.

According to the disclosure of the trustees, the amount due for work performed in November was two hundred dollars. One hundred and fifty dollars, being three fourths of that sum, was due absolutely, for which the defendants are chargeable.

Neal, being the first attaching creditor after this became due and payable, is entitled to hold that amount, his judgment exceeding one hundred and fifty dollars.

In December the whole amount of work performed was one thousand six hundred and two dollars and forty-two cents, of which three fourths, or one thousand two hundred and one dollars and eighty-one and one half cents, was due absolutely after the expiration of that month, and for which defendants are also chargeable.

This latter fund must be appropriated to satisfy the judgments of the several parties according to priority of attachment, whose attachments on their original writs were made after the work for December became due and payable. Parties whose attachments were made in December will not be entitled to hold any portion of this fund, such attachments having been made prematurely.

The defendants are liable to pay interest on the amount in their hands for which they are charged from and after the day on which demand of payment was made upon them.

When the defendants were summoned as trustees by the plaintiff in the original action, they had no goods, effects, or credits of the principal defendants in their hands or possession which could be reached by process of foreign attachment.

According to agreement, a nonsuit must be entered.

SHEPLEY, C. J., and HATHAWAY, J., concurred.

PROCESS OF GARNISHMENT RELATES ONLY TO TIME OF ITS SERVICE, and does not affect debts subsequently accruing: *Roby v. Labuzan*, 56 Am. Dec. 237; see also *Arrington v. Screws*, 49 Id. 408.

PROCESS OF GARNISHMENT REACHES ONLY LEGAL RIGHTS OF DEFENDANT: *Roby v. Labuzan*, 56 Am. Dec. 237; but judgment may be rendered against a garnishee for an indebtedness admitted to be due at a future day, but execution will be stayed until the maturity of the debt: *Cottrell v. Varnum*, 39 Id. 323.

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NORTON v. WEBB.

[36 MASS., 270.]

ON ONE PERSON'S ENGAGING TO FURNISH SUPPORT FOR ANOTHER WITHOUT DESIGNATION of any place where it is to be furnished, the support must be provided where the person to be supported elects to receive it without occasioning unnecessary expense.

ON CONVEYANCE OF FARM WITH MORTGAGE BACK, CONDITIONED FOR SUPPORT of grantor and his wife, the grantor is not bound to receive the support at the farm, and the grantee must furnish it at a place where the grantor elects to receive it.

NORTON, the demandant, conveyed a farm to Webb, the defendant, who mortgaged it back, with the condition that he should furnish the support for Norton and his wife. No place at which the support was to be furnished was designated in the mortgage. Norton and his wife lived on the farm for some time, and then left it, and received no support from Webb since. This writ of entry was then brought. The defendant contended that he had a right to furnish the support on the farm, and that the demandant had no right to elect where it should be furnished. The court instructed the jury that the demandant had a right to elect where he should receive the support; that the election when made was irrevocable; and that the burden of proving that the demandant had elected to receive his support at the farm was on the defendant. Verdict for demandant.

Morrell, for the tenant.

Vose, for the demandant.

By Court, SHEPLEY, C. J. The court decided on a former occasion that the mortgagor might retain possession until there had been a breach of the condition, if the mortgagee had elected to receive support in the house upon the farm: *Norton v. Webb*, 35 Me. 218. During the last trial a question was presented, whether the mortgagor had the right to elect where he would furnish support to the mortgagee and his wife, if they had not elected to receive it upon the farm. The jury were instructed that he had not that right; that he would be bound to furnish it elsewhere at their request.

When one person engages to furnish support for another without a designation of any place where it should be furnished, many reasons might be offered in favor of a construction authorizing the support to be furnished where the person providing it should elect, it being a suitable place. But a different construc-

tion has prevailed, requiring the support to be furnished where the person to be supported should elect to receive it without occasioning unnecessary expense: *Wilder v. Whittemore*, 15 Mass. 262; *Fiske v. Fiske*, 20 Pick. 499; *Flanders v. Lamphear*, 9 N. H. 201; *Holmes v. Fisher*, 13 Id. 9.

The instructions given appear to have been in conformity to this construction of the contract.

Exceptions overruled.

TENNEY, APPLETON, and CUTTING, JJ., concurred.

CONDITION BY GRANTEE IN DEED TO SUPPORT GRANTOR or a third person, effect of: See *Cross v. Carson*, 44 Am. Dec. 742, and note 750; *Pownall v. Taylor*, 34 Id. 725.

SMITH v. EATON.

[36 MAINE, 298.]

COURT HAS NO JURISDICTION WHERE DEFENDANTS RESIDE WITHOUT STATE and have no property within it; and the suit will be abated if objection to its maintenance is seasonably interposed by plea or motion.

LAWS REGULATING ACQUISITION OR TRANSMISSION OF TITLE TO PERSONALTY are those which are in force where the owner is domiciled.

STATE HAS UNCONTROLLED JURISDICTION OVER ALL PROPERTY, real or personal, within its jurisdiction.

ASSIGNMENT IN BANKRUPTCY IN NEW BRUNSWICK vests all the property of the bankrupt in the assignee; and one who is indebted to the bankrupt, and who is a resident of New Brunswick, but who is temporarily in this state, can not be charged by a creditor in this state as a trustee, after the assignment made.

EVIDENCE THAT FOREIGN BANKRUPTCY WAS FRAUDULENT AND COLLUSIVE IS INADMISSIBLE to impeach a bankrupt's certificate duly obtained from the commissioner and certified by the court of chancery under the statutes of the country.

DEFENDANT IN SCIRE FACIAS CAN NOT AVAIL HIMSELF OF ANY GROUND OF DEFENSE which was open to him in the suit of which that is a continuation, *semble*.

PLAINTIFFS, residents of this state, brought an action against James Albee, jun., and H. F. and J. E. Eaton, as his trustees. All the defendants were residents of New Brunswick, and none of them making appearance, Albee was defaulted, and the Eatons adjudged his trustees. The process was served upon the Eatons while they were temporarily in this state on business. Execution issued on the judgment, and demand was duly made of the trustees. This proceeding was a *scire facias* against the trustees. They offered a disclosure made prior to the entry of the action

before a justice of the peace. It was objected to, but admitted. The remaining facts are stated in the opinion.

Whidden and Chase, for the plaintiffs.

J. Granger, contra.

By Court, APPLETON, J. It was decided in *Lovejoy v. Albee*, 33 Me. 415 [54 Am. Dec. 630], that this court has no jurisdiction where the defendant and trustee both reside without the state and have no property within it. If in the original suit in which the defendant was summoned as trustee, objections to its maintenance had been seasonably interposed by plea or by motion, it would have been abated. The alleged trustee, instead of taking exception, submitted to the jurisdiction, suffered a default, and an execution issued, upon which a demand has been duly made on him.

The general rule of law undoubtedly is, that the defendant in *scire facias* can not avail himself of any ground of defense which was open to him in the suit of which that is a continuation. It may be a question, therefore, whether the defendant can take advantage on his disclosure on *scire facias* of the want of jurisdiction of the court in rendering the judgment in which he was defaulted, or whether his only remedy is not in reversing it by writ of error. In the view, however, which we have taken, the determination of this question does not become necessary. From the disclosure of the trustees on *scire facias*, it appears that Albee, the defendant, and the trustees in the suit of *Smith et al. v. Albee and Trustees*, are now and ever have been residents in the province of New Brunswick; that on January 4, 1849, Albee became a bankrupt; that an assignee was appointed, and that on the seventeenth of April, 1849, some days before the service of the trustee writ on the defendants, he obtained a certificate of discharge from the commissioner, and certified by the court of chancery under the acts of 5 Vict. c. 43, and 6 Vict. c. 4. These facts being set forth in the disclosure and established by documentary proofs, the defendants claim that they should not be considered as having any goods, effects, or credits of the principal debtor in their hands or possession; that even if indebted to Albee, which they deny, that such indebtedness has ceased and new relations have arisen between themselves and his assignee, binding upon them by the law of the country to which they owe allegiance.

From the answers of the defendants, it appears that previous

to his bankruptcy they had large dealings with Albee, and received from him various conveyances of real and personal estate, on account of which the plaintiffs claim that they should be charged. To determine this, resort must be had to the law of the domicile of the principal debtor and the trustees, for if no indebtedness exists there, none can arise from merely passing over the line which divides one government from another. Now, by the law of New Brunswick, the bankrupt is divested of all property within its territorial jurisdiction, and the same is transferred to the assignee as effectually by operation of law as it could be by the most solemn contract of the parties: *Beardsley v. Stephenson*, 1 Allen, 631. For the real estate conveyed the trustees could not have been charged had it been situated in this state. The laws regulating the acquisition or the transmission of title to personal estate are those which are in force where the owner is domiciled. The owner of personal property situated in the country where he resides has a title to it wherever he may be. It is true that when the property is here at the time of the assignment, the title of the foreign assignee is postponed to the claims of creditors resident in this country; but this principle does not apply when it was at the time of his bankruptcy in the jurisdiction in which the bankrupt resided, and has since been brought here. In *Plestor v. Abraham*, 1 Paige, 237, the controversy was between the bankrupt and his assignees and creditors, all residing in the country under whose laws the assignment was made. In delivering his decision, Walworth, chancellor, says: "Even the property itself at the time of the assignment was constructively within the jurisdiction of that country, being on the high seas, in the actual possession of a British subject. Under such circumstances, the assignment had the effect to change the property and divest the title of the bankrupt as effectually as if the same had been sold in England under an execution against him, or he had voluntarily conveyed the same to the assignee for the benefit of his creditors." The same doctrine was fully affirmed in the opinion of Marcy, J., in the same case, *Abraham v. Plestor*, 3 Wend. 538 [20 Am. Dec. 738], and is sanctioned by Story in his Conflict of Laws. A large proportion of the property purchased by the original defendant consisted of logs and lumber. If that purchase was in good faith, the title was vested in the purchaser. If void for any cause, the assignment transferred it to the legally appointed assignee. So, too, if any contracts were in force between these defendants and Albee, or any equitable relations subsisting be-

tween them, they were transferred, and the title to them and the right to enforce them was perfected in the assignee.

The bankrupt, his assignee, and the defendants were all domiciled in New Brunswick, subject to the laws of that province, and while they were all thus subjects, all the assets of the bankrupt, whether real or personal, whether equitable or at common law, passed from him as entirely as if his death had intervened. Every state has uncontrolled jurisdiction over all property, real or personal, within its territory. The defendants had ceased to be the debtors of Albee or to hold any property of his; new relations had arisen and become perfected, by which whatever obligations they were under to him, if any, were henceforth due to and were to be enforced by another. By leaving temporarily that government, no change in their legal rights or duties was created, and if they then ceased to have any goods, effects, or credits of the principal debtor, there has nothing occurred since by which they can justly be adjudged to possess them. Whether the *lex loci contractus*, the *lex rei sitæ*, or the *lex domicilii* is to govern, is immaterial, as in either event the rights of the parties must depend on the law of the province of New Brunswick; and according to those laws, whether they had had the property of the principal debtor in their hands or not, or had been indebted to him or not, they must be discharged, as the title to such property, and the right to enforce all subsisting contracts, had become perfected in the assignee of Albee.

These views do not conflict with the principles established in *Blake v. Williams*, 6 Pick. 286 [17 Am. Dec. 372], and in *Holmes v. Remsen*, 20 Johns. 229 [11 Am. Dec. 269], in which it was held that an assignment in bankruptcy in England does not transfer the personal property of the bankrupt here, or his debts due from our citizens as against his creditors resident here. But in those cases the property was in this country at the time of the assignment, and consequently amenable to our laws. The debtors of the bankrupt were citizens, and subject to our jurisdiction. In this case, the property was in a foreign land, and the defendants were the subjects of a foreign government, and bound by its laws. When they came within our jurisdiction, they brought with them their existing relations to their own citizens, according to the laws of their country: *Potter v. Brown*, 5 East, 129.

But it has been urged that the assignment of the bankrupt was fraudulent on his part, and that therefore nothing passed to his assignee. Were it so, whatever might be its effect on the

bankrupt's discharge, it would not reinvest him of his former estates. In *Morrison v. Albee*, 2 Allen, 145, the certificate of discharge of the same Albee, whose trustees the defendants are alleged to be, received the consideration of the supreme court of New Brunswick. It was there held that evidence that the bankruptcy was fraudulent and collusive was inadmissible, in a trial in *nisi prius* to impeach a bankrupt's certificate duly obtained from the commissioner and certified by the court of chancery, under the acts of 5 Vict. c. 43, and 6 Vict. c. 4. Carter, C. J., in his opinion says: "All our act requires to give validity to the certificate is: 1. That it should be under the hand and seal of the commissioner, with certain requisites as to form and substance; 2. That the bankrupt should make oath that it was obtained fairly and without fraud, etc.; and 3. The subsequent confirmation by the court of chancery, which is not made without affording an opportunity to the creditors to oppose it."

Indeed, it is difficult to perceive upon what principles the trustees could be charged for real or personal estate situated in another government or for contracts to be there performed, or how they could be required to remove property from another jurisdiction for the purpose of exposing it here to be levied on: *Lovejoy v. Albee*, 33 Me. 415 [54 Am. Dec. 630]; *Baxter v. Vincent*, 6 Vt. 615.

Defendants discharged.

SHEPLEY, C. J., and TENNEY, RICE, and HATHAWAY, JJ., concurred.

JUDGMENT WHERE DEFENDANT RESIDES WITHOUT AND HAS NO PROPERTY WITHIN STATE is void for want of jurisdiction: *Lovejoy v. Albee*, 54 Am. Dec. 630. As to the effect of judgments against non-residents, see the note to *Flint River Steamboat Co. v. Foster*, 48 Id. 273; *Ever v. Coffin*, Id. 587; *Dearing v. Bank of Charleston*, Id. 300.

CONCLUSIVENESS OF CERTIFICATE OF DISCHARGE IN BANKRUPTCY: See *Reed v. Vaughan*, 55 Am. Dec. 133; note to *Rice v. Maxwell*, 53 Id. 88.

SCIRE FACIAS, WHAT DEFENSES NOT AVAILABLE IN: See *Barber v. Chandler*, 55 Am. Dec. 533; *May v. State Bank of North Carolina*, 40 Id. 726.

DISCHARGE IN BANKRUPTCY UNDER FOREIGN LAW, EFFECT OF: See *May v. Breed*, 54 Am. Dec. 700, and note.

LEGAL SITUS OF PERSONALTY FOLLOWS OWNER'S DOMICILE: *Speed v. May*, 55 Am. Dec. 540, and note.

PIKE v. MONROE.

[36 MAINE, 309.]

LINE DESCRIBED AS RUNNING "DOWN RIVER" FROM POINT ON BANK must be taken to be a line along the river, and the words do not indicate merely the general direction.

BY COMMON LAW, ALL THAT PORTION OF LAND ON TIDE-WATERS between high-water mark and low-water mark, technically known as the "shore," originally belonged to the crown, and was held in trust by the king for public uses, and was not the subject of private property without a special patent or grant.

ORDINANCE OF 1641 VESTS TIDE-LANDS IN PROPRIETOR OF ADJOINING UPLAND, subject only to the limitations and qualifications contained in the proviso to the ordinance.

DEED BOUNDED ON RIVER IN WHICH TIDE EBBS AND FLOWS conveys the flats in front of and adjoining the same, to the extent of one hundred rods from high-water mark, if they extend so far.

OWNER OF UPLAND, TO WHICH FLATS ADJOIN, MAY SELL UPLAND WITHOUT FLATS, or the flats without the upland, or both together.

IN CONSTRUING DEED, EFFECT MUST BE GIVEN TO INTENTION of parties, if practicable, when no principle of law is thereby violated.

WHATEVER IS EXPRESSLY GRANTED, COVENANTED, OR PROMISED CAN NOT BE RESTRICTED or diminished by subsequent provisions or restrictions.

IF DEED MAY OPERATE IN TWO WAYS, one of which is consistent with the intent of the parties, and the other repugnant thereto, it will be so construed as to give effect to the intention indicated by the whole instrument.

DOUBTFUL WORDS AND PROVISIONS ARE TO BE CONSTRUED MOST STRONGLY AGAINST GRANTOR.

WRIT of entry on agreed facts. The opinion states the case.

Pike, for the demandant.

Downes and Chase, contra.

By Court, RICE, J. Both parties trace their title to the same source, claiming through mesne conveyances from John Bohannan, who was the grantee of the original proprietors of the town of Calais. November 10, 1796, Bohannan conveyed to Edward H. Robbins one hundred acres of land situate in the present city of Calais, then plantation No. 5, in Washington county, by the same description contained in his deed from the proprietors, to wit: "Beginning at the south side of a large white rock on the bank, in the south-west direction from the space between two uncovered rocks at the first small point above Stone Point, so called, and from thence running down river fifty rods to a stake and stones, and from said rock first mentioned, and said

stake and stones, running back from said river, fifty rods wide, in parallel lines, south-west, so far as to include the full quantity of one hundred acres, with privileges and appurtenances thereto."

Samuel Jones, in his deposition, states that the "white rock" on the bank of the river was not entirely covered at high water; and that the "stake and stones" were situated on the bank of the river, on the top of the bank, in the bushes, some short distance above the edge of the bank.

The first question raised is whether the line starting from the white rock and running down river to a stake and stones is a line running on the river, or whether the words "down river" simply indicate the general direction of the line from one monument to the other.

In *Hartsfield v. Westbrook*, 1 Hayw. 258, it was held that the terms in a deed, "down the swamp," constituted the swamp the boundary, though a straight course from the monuments at the termini of the line would not follow the line of the swamp.

In *Den v. Mabe*, 4 Dev. 180, the court held that a line from a monument on a river, west, "up the river" to a stake, was equivalent in law to "with the river," and that the line must pursue the course of the stream.

A call in a deed, "up the creek," means, ordinarily, a line run with the creek, and does not indicate the general course of the line: *Buckley v. Blackwell*, 10 Ohio, 508.

In *Harramond v. McGlaughon*, Tayl. 136, cited in a note to *Ex parte Jennings*, 6 Cow. 547, the court say: "When a deed, patent, or grant describes a boundary from a certain point down a river, creek, or the like, mentioning also course and distance, should the latter be found not to agree with the course of the river, etc., it ought to be disregarded, and the river considered the true boundary."

In *Jackson v. Louw*, 12 Johns. 252, the court say, where the call in the deed was from a point on the creek, thence up the same, those words necessarily imply that it is to follow the creek, according to its turnings and windings.

Nor is it material that a monument on the river should be specifically named in the deed. It is sufficient if it be made to appear that the monuments referred to are in fact on the river.

There are still other parts of the description in the deed that throw additional light upon its construction; such as the words, "from said rock first mentioned, and from the stake and stones, running back from the river, fifty rods wide, in parallel lines,

south-west, so far as to include one hundred acres," thus strongly indicating the river as one of the boundary lines of the lot.

From these considerations, we think it is apparent that the parties understood that one end of the lot was bounded on the river. If it were a fresh-water stream, according to the rule laid down in *Lunt v. Holland*, 14 Mass. 149, the land conveyed would extend to the center or thread of the main channel of the stream.

But this is a navigable river, in which the tide ebbs and flows; and the question is raised, whether the grant extends to low-water mark, or is restricted to the bank of the river at high-water mark.

By the common law, all that portion of land on tide-waters between high-water mark and low-water mark, technically known as the "shore," originally belonged to the crown, and was held in trust by the king for public uses, and was not the subject of private property without a special patent or grant: *Hale's de Jure Maris*, c. 4; *Storer v. Freeman*, 6 Mass. 437 [4 Am. Dec. 155]; *Commonwealth v. Alger*, 7 Cush. 53.

But by the ordinance of 1641, Colony Laws, c. 63, sec. 8, p. 148, "it is declared that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor on land adjoining shall have propriety to the low-water mark, when the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further; provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through the sea, creeks, or coves, to other men's houses or lands."

This ordinance has been held, both in Massachusetts and this state, in a series of judicial decisions, to have superseded the common law applicable to the proprietorship of the "shore," on tide-waters, and to have vested an absolute title thereto in the proprietors of the adjoining upland, subject only to the limitations and qualifications contained in the proviso to the ordinance: *Lapish v. Bangor Bank*, 8 Greenl. 85; *Winslow v. Patten*, 34 Me. 25; *Commonwealth v. Alger*, 7 Cush. 53.

By the application of these rules of construction and principles of law, it follows that the deeds from the proprietors to Bohannan, and from Bohannan to Robbins, conveyed not only the upland, but also the flats in front of and adjoining the same, to the extent of one hundred rods from high-water mark, if they extended so far.

On the third day of April, 1797, Robbins, the grantee in the

deed from Bohannan, reconveys to his grantor the northerly half of said lot of land, by the following words of description, to wit: "All my right, title, and estate in the northerly moiety or half of the hundred-acre lot on which the said Bohannan now lives, and bounded on said river; the half part hereby conveyed is bounded as follows: beginning on the bank of said river, at high-water mark, on the line dividing the premises from the lot on which David Ferrol lived, and commonly called the Ferrol lot, and thence running on the bank of said river, on high-water mark, twenty-five rods, and from thence, and the bound first mentioned, extending back by parallel lines one mile, according to the courses by which said land was conveyed to said Bohannan, so as to include fifty acres, and I, the said Robbins, do hereby covenant with the said Bohannan, that the premises are as free from all incumbrances as when conveyed by him to me."

There can be no doubt as to the identity of the lot of land conveyed by this deed. It is the northerly half of the same hundred acres which Bohannan had conveyed to Robbins by his deed of November 10, 1796.

The plaintiff contends that by this conveyance Bohannan was bounded by and restricted to high-water mark; and that the upland only passed by this deed.

The owner of upland, to which flats adjoin, may sell the upland without the flats, or the flats without the upland, or both together: *Deering v. Long Wharf*, 25 Me. 50. The defendant contends that both passed by this deed from Robbins.

The description in the deed is not entirely consistent with itself. The general descriptive terms are, "All my right, title, and estate in the northerly moiety or half of the hundred-acre lot on which said Bohannan now lives, and bounded on said river." We have seen that Robbins owned not only the upland, but by operation of law his title extended to and included the flats adjoining as part of his lot. Had the description stopped here, there could have been no doubt as to the true construction of the deed.

But it is contended that these general terms in the description are limited and controlled by the restrictive words which follow, "thence running on the bank of said river at high-water mark," so that the grant can not extend below that point.

The old books say, if there be two clauses or parts of a deed repugnant the one to the other, that the first shall be received and the latter rejected, unless there be some special reason to the contrary: 23 Am. Jur. 279.

The first deed and the last will shall operate, is the ancient maxim: *Paramour v. Yardley*, Plow. 541; Shep. Touch. 88.

Subsequent words shall not defeat precedent ones, if by construction they may stand together. But where there are two clauses in a deed, of which the latter is contradictory to the former, then the former shall stand: Cru. Dig., tit. Deed, c. 20, sec. 8.

These, however, are technical rules of construction, which were adopted, as declared by Lord Mansfield, "for want of a better reason," and are not entitled to much consideration, and should never be resorted to for purposes of construction unless difficulties are presented which can not be resolved by more satisfactory rules. In modern times, they have given way to the more sensible rule of construction, which is, in all cases to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it.

Robbins had purchased the whole lot of Bohannan; it contained one hundred acres; was fifty rods wide, and necessarily extended one mile from the river, and though not bounded in terms by high-water mark, he was bounded by monuments which in fact stood substantially at high-water mark. His title to the flats accrued to him only by the force of this deed.

He conveyed all his right, title, and estate to the northerly half of the lot; the tract conveyed was twenty-five rods wide, just half the width of the whole lot; it contained fifty acres; its western boundary was the same distance from the river as the western line of the original lot, and though bounded on the river at high-water mark, these bounds were at the same point on the face of the earth as were the monuments in the deed from Bohannan.

Whatever is expressly granted or covenanted or promised can not be restricted or diminished by subsequent provisions or restrictions; but general or doubtful clauses precedent may be explained by subsequent words and clauses not repugnant or contradictory to the express grant, covenant, or promise: *Cutler v. Tufts*, 3 Pick. 272; *Willard v. Moulton*, 4 Me. 14.

If a deed may operate in two ways, the one of which is consistent with the intent of the parties and the other repugnant thereto, it will be so construed as to give effect to the intention indicated by the whole instrument: *Solly v. Forbes*, 4 Moore, 448. Thus if I have in D., black acre, white acre, and green acre, and

I grant you all my lands in D., that is to say, black acre and white acre, yet green acre shall pass: *Stukeley v. Butler*, Hob. 172.

When one, being the owner of three parcels of land described in a certain deed conveying them to him, made a deed of conveyance of "three parcels or lots situated in P. and bounded as follows, to wit: the first lot beginning at, etc. [setting forth the boundaries of this lot only], being the same which was conveyed to me by deed," etc., referring to the deed describing the three lots, it was held that the deed conveyed all these parcels, and that to restrict it to one would be giving it an effect far short of what the words required: *Child v. Fickett*, 4 Me. 471.

That all doubtful words and provisions are to be construed most strongly against the grantor, is an ancient principle of the common law, which is recognized as a sound rule of construction by modern jurists.

It is quite probable that neither party fully understood the precise nature and extent of their rights in the flats at the time the several conveyances referred to were made. But from the contemporaneous and subsequent acts of the parties, as well as from the language of the deeds, we think it satisfactorily appears that each party understood, at the time the several conveyances were made by them, that they parted with all the rights they then had in the flats adjoining the uplands described in their deeds, and that this appears as fully, to say the least, in the deed from Robbins to Bohannon as in the one by which Robbins obtained his title. Such being the fact, no interest remained in him which could descend to the plaintiff's grantor, and consequently the plaintiff has no title to the premises in dispute.

A nonsuit is therefore to be entered.

SHEPLEY, C. J., and TENNEY, HATHAWAY, and APPLETON. JJ., concurred.

BOUNDARY FOLLOWS MEANDERINGS OF STREAM WHEN AND WHEN NOT: See *Lynch v. Allen*, 32 Am. Dec. 671; *Budd v. Brooke*, 43 Id. 321; *Slade v. Etheridge*, 57 Id. 557.

TITLE TO LAND COVERED BY SEA IS IN CROWN, by the common law: *Mayor etc. of Mobile v. Esalava*, 33 Am. Dec. 325.

RIGHT OF RIPARIAN PROPRIETOR UNDER MASSACHUSETTS COLONIAL ORDINANCE OF 1641 extends to flats between high and low water mark: *Weston v. Sampson*, 54 Am. Dec. 764.

CONVEYANCE OF LAND CARRIES ADJOINING FLATS AS APPURTENANCES: *Jones v. Janney*, 42 Am. Dec. 309, and note.

INTENTION OF PARTIES GOVERNS CONSTRUCTION OF DEEDS WHEN AND WHEN NOT: See *Ware v. Richardson*, 56 Am. Dec. 762; *Hileman v. Bousland*, 53 Id. 474; *McCullough v. Wall*, Id. 715.

DEED SHOULD BE CONSTRUED MOST STRONGLY AGAINST GRANTOR, when it is capable of two constructions: *City of Alton v. Illinois Transportation Co.*, 52 Am. Dec. 479, and note.

STATE v. DRAKE.

[36 MAINE, 366.]

WARRANT ISSUED BY MAGISTRATE FOR ARREST OR IMPRISONMENT SHOULD BE UNDER SEAL; and if the warrant is not under seal, it is void, and the proceedings had thereunder will be quashed.

DEFENDANT was arrested under a warrant issued by a magistrate. The warrant was not under seal, and on the trial the defendant moved to have the proceedings quashed. The motion was denied. Defendant excepted.

Evans, attorney general, for the state.

A. Sanborn, for the defendant.

By Court, SHEPLEY, C. J. There can be little doubt that the common law required that warrants issued for the arrest or imprisonment of a person by magistrates should be under seal. The practice appears to have conformed to it in England and in this country. No case has been presented or noticed in which a warrant issued without a seal for such a purpose has been decided to be valid. To require a seal in such cases may not be important, only as matter of form. It gives the instrument a higher grade of character, arrests the attention in the hurry of business, allowing a pause for reflection.

The cases deciding that a warrant may be valid without a seal do not appear to have been those authorizing an arrest or imprisonment of a person. They might have been correctly decided, as they were, without asserting the doctrine that a warrant *ex vi termini* did not imply an instrument under seal. It may be correct that the word in common parlance signifies no more than an authority. It will not follow that by usage in the enactment of laws for the punishment of offenses, and in judicial precepts, it has not acquired a more definite and limited signification.

The almost unbroken line of judicial precepts denominated warrants, and having seals affixed in conformity to the requirements of the common law, would authorize the conclusion that

it had. While courts have admitted and legislatures have enacted that a scroll, scrawl, or scratch might be regarded as a seal, it is not known that any one has determined that a seal of some description was not necessary to give validity to instruments required to be executed or issued under seal.

In the case of *State v. Coyle*, 33 Me. 427, a seal appears to have been regarded as essential on a warrant issued in a criminal prosecution.

In the case of *State v. McNally*, 34 Me. 210 [56 Am. Dec. 650], there was a seal, or what was designed for one, affixed in the form commonly practiced by magistrates issuing warrants, and by scriveners in the execution of conveyances.

If a warrant issued without a seal in a criminal prosecution, by a magistrate, may be valid, it would seem that one might be when so issued by any court of justice; and yet all such precepts issuing from a court having a seal must be issued under the sanction of that seal. This appears to have been admitted by the lord chief justice, in his opinion in the case of *Padfield v. Cabell*, 7 Villes, 411, when the precept issued from any court of record.

Whenever it has been held that a warrant issued in a criminal prosecution might be valid without a seal, it is apparent that there has been a straining of the law to support the proceedings. Such a course is unauthorized, and far from being productive of good general results.

Exceptions sustained, and proceedings quashed.

TENNEY, HOWARD, and APPLETON, JJ., concurred.

NECESSITY OF SEAL TO WARRANT ISSUED BY MAGISTRATE: See *State v. McNally*, 56 Am. Dec. 650; *Tackett v. State*, 24 Id. 582.

PRATT v. PIERCE.

[36 MAINE, 448.]

PROOF OF FACTS FROM WHICH LEGAL MARRIAGE MAY BE REASONABLY INFERRED is sufficient evidence of marriage to establish legitimacy of a child of the marriage.

PRESUMPTION THAT MARRIAGE PERFORMED BY ORDAINED MINISTER WAS LEGALLY PERFORMED exists where there is no proof that it was not legally performed; and a marriage in one town by the ordained minister of another town is valid in the absence of proof that neither of the parties was a resident of the latter town, and that there was an ordained minister in the town where the ceremony was performed.

DISSEISER HAVING RIGHT OF ENTRY MAY CONVEY TITLE as freely as if there had been no disseisin.

CONVEYANCE BY DISSEISER IS NOT VOID FOR MAINTENANCE where the consideration is the grantee's bond, by which he agrees to pay the grantor a certain amount if the title proved to be valid in suits he would immediately bring to recover possession.

WRIT of entry. Hezekiah Wright and Charlotte Sewall were married in Monmouth, Kennebec county, in 1810, by the Rev. Dr. Gillett, an ordained minister of Hallowell. They lived together as man and wife until the death of the husband in 1815, leaving H. H. Wright, his only son and heir, who died in 1850, leaving his mother, Charlotte Wright, his sole heir. Charlotte claimed title to the lot in question through her son, who in turn derived title from the father. In February, 1850, Charlotte Wright conveyed all her interest in the lot to the demandant. The consideration for the deed was the demandant's bond, by which he agreed to pay Charlotte three hundred dollars if her title should prove valid in suit he would immediately bring to recover possession. The tenant claimed through several mesne conveyances under a tax deed made in 1837. There was no proof that the land was duly advertised. The case was submitted to the court to order a nonsuit or default, as the law may require.

Cutting, for the demandant.

A. W. Paine and J. H. Hilliard, contra.

By Court, SHEPLEY, C. J. To establish the title of the demandant, it is necessary that he should prove that Hezekiah Hartley Wright was the legitimate child of Hezekiah Wright. Positive proof of a legal marriage is required upon the trial of persons indicted for polygamy and adultery, and in actions for criminal conversation. In other cases, proof of facts from which a legal marriage may be reasonably inferred will be sufficient. It can not be inferred from proof of facts which show that there could not have been a legal marriage. Such were the facts in the case of *Ligonia v. Buxton*, 2 Greenl. 102 [11 Am. Dec. 46].

In this case, the facts proved do not show that there could not have been a legal marriage. If either of the parties resided in Hallowell, or if there was no ordained minister then residing in Monmouth, the marriage by the ordained minister residing in Hallowell was a legal one, although the ceremony was performed in Monmouth. The presumption of law from the facts proved

is, that the ceremony of marriage was legally performed, there being no proof that it was not: *Damon's Case*, 6 Greenl. 148. The presumption being that the minister did not violate the law, the marriage must be regarded as legal.

It is contended that the demandant acquired no title by the deed made by Charlotte Wright to him, on February 22, 1850, because he purchased the title knowing that person was disseised, and that another person was in possession, claiming title. By the common law, no title could have been thus acquired. In this respect, the common law has been abrogated in this state, by the provisions of the statute, chapter 91, section 1, which declare that all the title or interest of the grantor shall pass by a deed of conveyance, if he had a right of entry, whether he was seised or not at the time of the conveyance.

But it is said that the statute should receive a construction that would permit such conveyances to be valid, when made under circumstances that would not show that the grantee had been guilty of maintenance, and decide them to be invalid when made under circumstances that would show it. The statute makes no such distinction or qualification. It appears to have been the intention so to alter the law as to permit the titles of persons disseised and having a right of entry to be as openly and freely sold and purchased as they might have been had there been no disseisin.

When a person had been wrongfully deprived of a part of his title by disseisin, the legislature may have considered it hard, if not unjust, to make him submit to a loss of the remainder or encounter the risk, loss, and trouble of litigation.

Charlotte Wright had therefore a right of entry when she conveyed it to the demandant, and her title passed to him.

As the counsel for the tenant admit, that the title derived from the collector of taxes was presented only to prove that those claiming under it had been in possession under a claim of title, it will be sufficient to observe that there is no proof that the land was advertised in the manner prescribed by the statute then in force.

It is not insisted that the deposition of the collector was not properly excluded.

Tenant defaulted.

TENNEY, RICE, and HATHAWAY, JJ., concurred.

AFFILIATION.—This subject is discussed in the note to *Weatherford v. Weatherford*, 56 Am. Dec. 206.

PRESUMPTION IN FAVOR OF VALIDITY OF MARRIAGE SOLEMNIZED BY ONE AUTHORIZED TO SOLEMNIZE MARRIAGE: See *Jones v. Jones*, 36 Am. Dec. 723; *State v. Kean*, 34 Id. 162.

CONVEYANCE OF LANDS IN ADVERSE POSSESSION OF ANOTHER: See *Cresinger v. Welch*, 45 Am. Dec. 565; *Parker v. Proprietors*, 37 Id. 121; *Gooman v. Newell*, 33 Id. 379.

MAINTENANCE.—This subject is discussed in the note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 308; see also *Jackson v. Johnson*, Id. 433.

REED v. PIERCE.

[36 MAINE, 455.]

COVENANT AGAINST INCUMBRANCES IS BROKEN AT TIME OF CONVEYANCE by existence of outstanding mortgage on the premises.

DAMAGES ON BREACH OF COVENANT AGAINST INCUMBRANCES BY OUTSTANDING MORTGAGE is the sum paid, if the mortgage is discharged by the covenantee; but if the incumbrance is not removed, and there is no action on the part of the mortgagee to enforce his mortgage, damages are nominal.

ACTION FOR BREACH OF COVENANT AGAINST INCUMBRANCES IS BARRED by the subsequent discharge in bankruptcy of the covenantor.

SEVERAL COVENANTS IN DEED OF WARRANTY ARE DISTINCT; their breach arises at different times, is established by proof of different facts, and damages therefor may be enforced by different suits, and recompensed by different rules of damages; and whatever may be a discharge of one is not necessarily that of another and distinct covenant.

DISCHARGE IN BANKRUPTCY IS NO DEFENSE TO ACTION FOR BREACH OF COVENANT of warranty when, at the time of the discharge, there was no breach of the covenant, and whether there would be any such breach was uncertain.

ACTION for breach of covenant. The opinion states the case.

Cutting, for the plaintiff.

Knowles, contra.

By Court, APPLETON, J. The defendant conveyed to the plaintiff by deed of warranty premises which at the time were subject to mortgage, and has since received his discharge in bankruptcy. At the time of his application and discharge, the notes secured by mortgage were outstanding, and no entry had been made by the mortgagee for the purpose of foreclosure. Subsequently the mortgage was foreclosed, and the plaintiff was evicted by the paramount title of the mortgagee. This suit is brought on the several covenants of the defendant's deed, in bar to the maintenance of which the defendant has pleaded his discharge.

The covenant against incumbrances was broken at the time of the conveyance. The damages to which the plaintiff was entitled were readily ascertainable. If he had paid the mortgage notes, the sum paid would have been the measure of damages. If the incumbrances had not been removed, and there had been no action on the part of the mortgagee to enforce his mortgage, the plaintiff's damages would have been nominal. To this covenant, as it was broken before the defendant's bankruptcy, and as the plaintiff might have proved his claim for its breach, the discharge is a bar.

The several covenants in a deed of warranty are distinct; their breach arises at different times; is established by proof of different facts, and damages therefor may be enforced by different suits and recompensed by different rules of assessment. It is obvious, then, that what may be a discharge of one is not necessarily that of another and distinct covenant.

The breach of the other covenants was long after the discharge in bankruptcy. So far as the claims now in suit could have been proved, and the plaintiff have received his dividends upon their proof, the discharge is a bar, and no further.

The defendant, to show that they might have been proved, relies on the sixth section of the bankrupt act, by which persons having uncertain and contingent demands are permitted to come in and prove such debts or claims.

The meaning of the phrase "contingent demand," and the corresponding expression in the English bankrupt law, "debt payable upon a contingency," has been definitely settled by repeated adjudications in this and in other states, as well as by the English courts.

In *Woodard v. Herbert*, 24 Me. 360, the distinction between a contingent demand and a contingency whether there ever would be a demand was recognized and adopted. "The contingent or uncertain demands provided for," says Shepley, J., "in the act of congress, are the contingent demands which were in existence as such, and in a condition that their value could be estimated at the time when the party was decreed a bankrupt." The same construction was reaffirmed in *Ellis v. Ham*, 28 Id. 385, and in *Dole v. Warren*, 32 Id. 94 [52 Am. Dec. 640]. In *Goss v. Gibson*, 8 Humph. 199, it was held that a discharge in bankruptcy would not relieve one surety from the claim of another surety who had paid money for the principal after the decree. "At the time these defendants were declared bankrupts," says Green, J., "the complainant had no debt or demand

against them. The complainant had no demand that could be proved at the time the defendants were declared bankrupts. The possibility of the demand that now exists was incapable of valuation." It was decided in *Cake v. Lewis*, 8 Pa. St. 493, that the liability of a principal to his guarantee was not discharged by bankruptcy. In *Boorman v. Nash*, 9 Barn. & Cress. 145, the defendant, who had contracted for a certain quantity of oil to be delivered to him at a future day at a certain price, became bankrupt before the day arrived, and obtained his certificate. "The right of the plaintiff," says Lord Tenterden, "to maintain this action depends upon the question whether he could or could not have proved his demand under the commission of bankrupt issued against the defendant. It appears to us impossible that he should so prove it; for at the time when the commission issued, it was uncertain not only what amount of damage, but whether any damage would be sustained." A similar decision was made in *Woolley v. Smith*, 54 Eng. Com. L. 610.

In *Thompson v. Thompson*, 2 Scott, 266, it was decided that the installments of an annuity, for the payment of which a surety expressly covenanted in default of the grantor, are not provable under a fiat against the surety, when such installments do not become due until after the bankruptcy of the surety. "Before the days of payment arrive," said Tindal, C. J., in delivering his opinion, "these installments are not only no debt, but can never become a debt from the surety, except in the event that the grantor of the annuity shall make default in such payments. The value of such a contingency it is impossible to calculate:" *Ex parte Davies*, 1 Dea. 115; *Toppan v. Field*, 4 Ad. & El., N. S., 387; *Hinton v. Acraman*, 3 Man. G. & S. 369; S. C., 52 Eng. Com. L. 366.

In the *South Staffordshire Railway Co. v. Burnside*, 2 Eng. L. & Eq. 418, the holder of shares in a corporation, who became bankrupt and received his certificate, was held not to be discharged from his liability for subsequent calls.

In *Hankin v. Bennett*, 14 Eng. L. & Eq. 403, the defendant executed a bond, whereby he became liable as surety to pay the plaintiff such costs as the plaintiff should in due course of law be liable to pay in case a verdict should pass for certain defendants in an action of *scire facias*, in which the now plaintiff sued as a nominal party. "We think, however," says Martin, B., "this liability was not a debt at all within the meaning of the section. It was a contract to indemnify a nominal plaintiff,

whose name was used by a third person, against such costs as the plaintiff would become liable to pay if the defendants should obtain judgment in their favor. It seems to us impossible to consider that this is a debt. It is a contingent liability, but not a contingent debt."

The plaintiff could not have proved any claim for breach of the covenant that the defendant would warrant and defend the premises against the lawful claims and demands of all persons, for it had not been broken. Whether there were any such claims and demands outstanding, and whether they embraced the whole or a part of the premises conveyed, was uncertain. If any such existed, their enforcement was dependent on the will of those having such claims. The plaintiff could not have presented any present claim or existing demand. The possibility that one might arise is not enough. In all sales of personal property the title of the vendee may be defeated by adverse and superior rights. In such sales there may be a breach of the implied warranty of title by subsequent eviction.

The vendee of real or personal property, in the undisturbed enjoyment of his purchase, and without any breach of the covenants, express or implied, of his vendor, can hardly be considered as having a contingent claim, because of the possibility that some unknown claimant may at some indefinitely remote period of time interpose a superior title, by means of which he may be deprived of the property purchased. If the unbroken covenants of a deed, or the possible breach of the implied warranty of title in sales of personal property, were to be deemed claims within the statute, then every grantee or vendee might present his claim before the commissioner, and the estate of the bankrupt would remain unadjusted till all possibility of a breach should be barred by the statute of limitations, for it could not before such time be known that they might not arise. Such a position would be entirely at variance with the provision of section 10, which requires that all proceedings in bankruptcy shall be brought to a close within two years after the decree declaring the bankruptcy, if practicable, for it would lead to an indefinite postponement of the settlement of estates. It was adjudged in *Bennett v. Bartlett*, 6 Cush. 225, in relation to personal property, that a discharge in bankruptcy was no bar to the creditor's right of action against the debtor, on the implied warranty of title, when the breach occurred after such discharge. The reasoning of the court in that case is equally applicable to the case at bar.

The result is, that the discharge affords no defense except as to the covenant against incumbrances, which alone could have been proved.

Defendant defaulted.

SHEPLEY, C. J., and TENNEY, RICE, and HATHAWAY, JJ., concurred.

COVENANTS AGAINST INCUMBRANCES ARE BROKEN IMMEDIATELY IF AT ALL: See the cases cited in the note to *Morse v. Garner*, 47 Am. Dec. 572.

MEASURE OF DAMAGES ON BREACH OF COVENANT AGAINST INCUMBRANCES: See *Andrews v. Davison*, 43 Am. Dec. 606, and note; *Patterson v. Stewart*, 40 Id. 586.

DISCHARGE IN BANKRUPTCY DOES NOT AFFECT CLAIMS SO UNCERTAIN that they can not be proved against the estate of the bankrupt: *Dole v. Warren*, 52 Am. Dec. 640. The principal case was cited in *Fernald v. Johnson*, 71 Me. 440, on the distinction between a contingent liability and a contingency the happening of which may bring into existence another.

HUNTINGDON v. HALL.

[36 MAINE, 501.]

IMPLIED WARRANTY OF TITLE ARISES WHEN VENDOR IS IN POSSESSION of the chattel by himself or by his servant at the time of the sale; but where, at the time of sale, the chattel is on the land and in the possession of a third person, no warranty of title arises.

ASSUMPSIT. The opinion states the case.

J. T. Hilliard, for the plaintiff.

Rowe and Bartlett, contra.

By Court, APPLETON, J. The plaintiff, having purchased a house of the defendant on the land and in the occupation of a third person, claims to recover back the consideration paid, upon the ground of an implied warranty of title by the vendor in the sale of personal chattels. The contract between the parties shows that the one bought and the other sold the house as personal property, and it must be so considered in determining their rights.

There was no fraud, no express warranty, no delivery of the thing sold, and no assertion of title on the part of the vendor before or at the time of sale. The bill of sale discloses that it was not in the possession of the vendor, and the evidence shows that it was on the land of a third person. In such case, no warranty of title will be implied. The implied warranty arises when

the vendor is in possession of the chattel himself or by his servant at the time of the sale. "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own, and not as the agent of another, and for a fair price, he is understood to warrant the title:" 2 Kent's Com. 478. This question was elaborately discussed in *Morley v. Attenborough*, 3 Exch. 512; and after a careful review of the English authorities, Parke, B., in delivering the opinion of the court, thus declares the law: "It would seem that there is no implied warranty of title in the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty or an equivalent to it by declarations or conduct; and the question in each case, where there is no warranty in express terms, is whether there are such circumstances as to be equivalent to such warranty." In *McCoy v. Archer*, 3 Barb. 323, after a careful examination of the decisions in relation to this subject, the court came to the conclusion that if the property sold was at the time of the sale in the possession of a third person, and there was no affirmation or assertion of ownership, no warranty of title would be implied; but if there was an affirmation of title, in such case the vendor would be subjected to the same liability as if he had possession.

In *Russell v. Richards*, 11 Me. 433 [26 Am. Dec. 532], the doctrine of implied warranty would seem to be limited to the case where the vendor has possession. "A sale of a chattel," says Mellen, C. J., "in the possession of the vendor, amounts to a warranty of title; not so in the case of real estate." The law is laid down in accordance with these views in the various text-books, with the exception of Story on Sales, 535, cited by the counsel for the plaintiff in his argument: Ross on Vendors and Purchasers, 335; Long on Sales, Rand's ed., 201; 1 Parsons on Cont. 458. The cases where it is asserted in general terms that in the sales of personal chattels the law will imply a warranty will be found to be those in which the vendor was in possession, and where the distinction here considered did not arise, and was not necessarily involved in their determination.

There is no evidence that the plaintiff has paid the notes given for his purchase. It is not necessary to determine whether the money can be recovered back as on a failure of consideration.

Plaintiff nonsuit.

SHEPLEY, C. J., and TENNEY and RICE, JJ., concurred.

WARRANTY OF TITLE IS IMPLIED IN SALE OF CHATTEL: *Chancellor v. Wiggins*, 39 Am. Dec. 499, and note; *Perley v. Balch*, 34 Id. 56; *Barton v. Faherty*, 54 Id. 503.

BRYANT v. CROSBY.

[36 MAINE, 562.]

CONTRACT IS CONDITIONAL SALE, AND NOT BAILMENT, where property is delivered to one for a certain consideration, and no option is given to the purchaser upon any contingency to return it, and none is given to the seller to reclaim it, except upon the purchaser's failure to make payment or to retain possession.

DESCRIPTION OF PROPERTY SOLD AS IN "GOOD ORDER AND CONDITION" is equivalent to a representation that it was in such condition, and the seller would be guilty of fraud if he knew it was not, although the description is contained in a contract of sale signed only by the purchaser and his surety.

SURETY CAN NOT BE DISCHARGED ON GROUND OF FRAUDULENT REPRESENTATIONS made to his principal except when that principal would be.

SELLER IS NOT GUILTY OF FRAUD IN MISREPRESENTING CONDITION OF GOODS sold, unless he knew that his representations were false.

FRAUDULENT CONCEALMENT OF FACTS FROM PRINCIPAL WILL NOT DISCHARGE SURETY necessarily; the concealment which entirely discharges a surety is one of facts known to the other party and not known to him, and known to be of a character to materially increase the risk beyond that assumed in the usual course of business of that kind, he having a suitable opportunity to make them known to the surety.

PARTIES HAVE RIGHT TO ADJUST AMOUNT DUE IN MONEY ON CONTRACT PAYABLE IN WOOL, where at the time of payment several installments of wool have been delivered, but a large amount still remains payable; and on such an adjustment neither party can be relieved without error, mistake, or fraud in making it; and in the absence of such evidence, it is error for the court to instruct the jury as to the mode of reckoning to ascertain the amount without regard to the settlement made by the parties.

PAROL EVIDENCE IS NOT ADMISSIBLE TO GIVE EFFECT OF MORTGAGE TO CONTRACT in form an absolute sale of the property described.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW CONSIDERATION HAS NOT BEEN PAID as the contract purports it to have been, where the contract is not under seal.

ASSUMPSIT against defendant as surety on a contract by which one Morrill, his principal, purported to receive a number of sheep from the plaintiff in "good order and condition," and for which they jointly and severally agreed to deliver to plaintiff a certain amount of wool, payable, one half in June, 1848, and half in June, 1849. The contract was drawn up by the plaintiff, and contained a provision as follows: "The said stock,

and the wool sheared from them, and all increase, shall be and remain at all times the property of said Bryant, until the payments are made as above, and the same shall be well kept at our risk; and on failure to make any payment as aforesaid, or if they pass out of our hands, said Bryant may take them at any time, and we will pay all expense and damage." The contract was signed by Morrill and Crosby only, and not by Bryant, and was dated November 30, 1847. There were several indorsements of the contracts of receipts of different amounts of wool, the last one being dated July 16, 1850. There was also an indorsement dated August 26, 1850, reciting that the amount due on that obligation was six hundred and sixty-three dollars and twenty cents. On that date Morrill made a bill of sale, stating that Morrill, in consideration of six hundred and sixty-three dollars and twenty cents, paid by Bryant, transferred and delivered to Bryant certain personalty on his farm. On the back of this bill of sale were indorsements of receipts of property to the value of five hundred and fifty-four dollars and twenty-five cents. Bryant introduced testimony to show that this bill of sale was taken as collateral security. There was evidence tending to show that the sheep were poor, old, and diseased, and also evidence showing the contrary. Morrill selected the sheep, and there is no evidence that Crosby saw them till after they were delivered. The court charged that if Bryant made untrue representations to Morrill, the surety would be discharged, although Morrill saw and selected the sheep; and that if Bryant delivered the sheep to Morrill knowing they were diseased, and concealed the fact, the surety would be discharged. The court further instructed the jury to find whether the bill of sale was an absolute sale or taken as collateral security; and that if Morrill had consent of the plaintiff to sell the property and did sell it, the surety was discharged to that extent, otherwise Bryant would not be responsible for the sale; and also charged the jury as to the mode of reckoning to be used to ascertain the amount due on the original contract, without regard to the settlement made by the parties on August 26, 1850. Verdict for plaintiff. The defendant excepted to the rulings and instructions.

J. Crosby, for the defendant.

S. H. Blake, *contra*.

By Court, SHEPLEY, C. J. It is insisted in defense that the contract made on November 30, 1847, constituted a bailment, and not a sale of the property.

No option was given to Morrill upon any contingency to return it; and none to the plaintiff to reclaim it, except upon the failure of Morrill to make the payment or to retain possession. The contract therefore provided, not for a bailment, but for a conditional sale.

It is also insisted that it contained a warranty by the plaintiff that the sheep were at the time of sale "in good order and condition."

It was not signed by the plaintiff. The engagements were not made by him, but to him. He entered into no warranty. The idea is presented by those words to both parties, that the sheep were in that condition; and that is equivalent to a representation that they were. It being regarded as a representation made by him, the plaintiff would be guilty of fraud if he then knew that they were not in that condition.

The jury were instructed "that they would look at all the evidence and see if Bryant made any representations to Morrill that were untrue, and if he did, although Morrill saw the sheep and selected them, it would discharge the surety."

A surety can not be discharged on the ground of fraudulent representations made to his principal except when that principal would be. The plaintiff could not in law be considered as conducting fraudulently, unless he knew that the representations were false. To make him lose his security because his representations were untrue, when he did not know them to be so, is to impose upon him the risk of a warrantor.

A fraudulent concealment of facts from his principal would not necessarily have the effect to discharge the surety; while he would be relieved so far as his principal would be.

A concealment which entirely discharges a surety is one of facts known to the other party and not known to him, and known to be of a character to materially increase the risk beyond that assumed in the usual course of business of that kind, having a suitable opportunity to make them known to the surety.

Respecting these matters, the instructions were too favorable to the defendant.

Three indorsements had been made upon the contract of wool received in part payment after the time when the payments should have been made. The price of wool might have been quite different at the times when it was delivered and when it was by the contract to be delivered. After the actual delivery and indorsement of it the principal parties agreed upon the amount remaining due upon the contract, and that was indorsed

upon the back of it, and subscribed by Morrill. They had a right to adjust the matter respecting the price to be allowed for the wool according to their own pleasure, although the effect of those indorsements might be different from what they would otherwise have been. When they had thus made an adjustment, neither party could be relieved from it without proof of some error, mistake, or fraud in making it. There being no such proof, the jury were instructed to find what would be due on the contract according to a mode of reckoning stated, without regard to that settlement made by the parties. The mode prescribed was less favorable to the defendant than the adjustment. In this there was error, and for this cause a new trial must be granted.

As the same questions may be again presented, arising out of the sale of property from Morrill to the plaintiff on August 26, 1850, and the indorsements upon that contract, a new trial may be prevented or facilitated by an opinion upon its effect.

It is in form an absolute sale of the property described. Parol testimony can not be received to vary it and give to it the effect of a mortgage. There is nothing found in it stating or indicating that the property or the price of it was received in part payment of the contract made on November 30, 1847. It states that the consideration had been already paid by the plaintiff to Morrill, leaving the inference that it was a transaction having no connection with the sale or payment for the sheep.

It is only by the reception of parol testimony that proof can be made that the consideration had not been in fact paid as it purports to have been. The contract is not under seal, and there can be no legal objection to the admission of such testimony. It is only by the like testimony that the defendant can prove that the property, or the agreed price of it, was to be applied in payment of the first contract; and if such testimony be admitted, it follows that it must be to prove to what extent property has been received and not paid for, and to be so applied. Such testimony may be received, for it will not vary the terms of the written contract. A surety, by such testimony, can not claim to have more so applied than his principal could. If the first contract were otherwise paid, Morrill could not recover by virtue of the last payment for hay, wheat, or oats, without proof of their delivery to the plaintiff; for by the contract they were in the charge and at the risk of Morrill. Parol testimony might also be received to prove that the property, or

the price of it, received on December 21, 1850, was to be applied in payment of the first contract.

Exceptions sustained, verdict set aside, and new trial granted.

TENNEY, RICE, and HATHAWAY, JJ., concurred.

SURETY OF PURCHASER CAN NOT OBTAIN RELIEF ON GROUND OF FRAUD in sale unless it appear that his principal and the vendor have combined to defraud him: *Brown v. Wright*, 18 Am. Dec. 190.

MISREPRESENTATIONS BY SELLER DO NOT VITIATE SALE unless he knew their untruth: *Staines v. Shore*, 55 Am. Dec. 492, and note; but see *Mitchell v. Zimmerman*, 51 Id. 717; *Munroe v. Pritchett*, 50 Id. 203.

FRAUDULENT CONCEALMENTS, GENERALLY: See *Baker v. Seahorn*, 55 Am. Dec. 724; *Haynie v. Hall*, 42 Id. 427; *Mitchell v. Zimmerman*, 51 Id. 717; *Ingram v. Morgan*, 40 Id. 626, and note; *Smith v. Beatty*, Id. 434.

PARTIES TO SETTLEMENT CAN NOT CLAIM MORE THAN SETTLEMENT GAVE THEM, unless they were overreached by fraud, misrepresentation, concealment, or mistake: *Murrel v. Murrel*, 49 Am. Dec. 664; and where an account has been settled, a balance struck, and security given for its payment, a party complaining of fraud or mistake must allege it specifically, and prove the allegation before a court will allow him to unravel the account: *Langdon v. Roane*, 41 Id. 60, and see cases cited in note.

VENDOR'S LIABILITY FOR FRAUD WHERE THERE IS NO WARRANTY: See *Bartholomew v. Bushnell*, 52 Am. Dec. 338, and cases cited in note.

DEED ABSOLUTE ON ITS FACE MAY BE SHOWN BY PAROL TO BE MORTGAGE: *Hall v. Savill*, 54 Am. Dec. 455, and note. The principal case was cited in *Reed v. Reed*, 71 Me. 158, on the point that parol testimony was not admissible to show that a deed in terms absolute was intended only as security for a debt.

CONSIDERATION MAY BE EXPLAINED, CONTRADICTED, OR REBUTTED BY PAROL when and when not: See *Swafford v. Whipple*, 54 Am. Dec. 498; *West v. Kelly*, Id. 192; *Groves v. Steel*, 46 Id. 551, and note; *Burleigh v. Coffin*, 53 Id. 236.

SMITH v. STANLEY.

[37 MAINE, 11.]

WHERE GRANTEE OF LAND EXECUTES MORTGAGE THEREOF AT TIME HE TAKES HIS DEED, to secure the payment of the purchase money, he has but an instantaneous seisin, which does not entitle his wife to dower; and she has no different rights in case the mortgage is made to a third person, who pays the consideration in pursuance of a previous agreement between the parties.

MORTGAGE CAN BE DISCHARGED ONLY BY PAYMENT IN FACT or by the release of the mortgagee.

WHERE MORTGAGEE RELEASES LAND FROM MORTGAGE given by the mortgagor, at the time when he took the conveyance, to secure the purchase money, the mortgagor's seisin has effect by relation from the time of the execution of the original deed, and his wife will be dowable therein.

WRIT of dower. In 1831 the plaintiff was lawfully married to Jotham Smith, who died in 1850. In 1833 one Eastman conveyed the land in which the plaintiff claims dower to Jotham Smith, and at the same time the latter conveyed the premises in mortgage to Stanley, one of the defendants, who furnished the consideration for the deed from Eastman. In 1838 Jotham Smith and Stanley executed a deed of one half of the premises to William Smith, and in this deed Stanley relinquished all his interest in the premises by virtue of the mortgage. At the same time Jotham and William Smith gave a joint mortgage of the premises to Stanley to secure the amount then due to him. Subsequently Stanley sued out a writ of entry, the mortgage not having been paid, and thereby obtained possession of the premises, which he held at the time of the suing out of the writ.

R. Goodenow, for the demandant.

Whitcomb, for the defendants.

By Court, HATHAWAY, J. If a grantee of land, at the time when he receives his deed, execute a mortgage of the same premises to his grantor to secure the payment of the purchase money, he has but an instantaneous seisin, by virtue of which his wife does not acquire a right of dower; nor are her rights as to dower in such case any different if the mortgage be made to a third person, who paid the consideration in pursuance of a previous arrangement between the parties: *Ham v. Ham*, 14 Me. 351; *Stow v. Tift*, 15 Johns. 458 [8 Am. Dec. 266].

Nothing but payment in fact or the release of the mortgagee will discharge a mortgage: *Crosby v. Chase*, 17 Me. 369.

When Stanley joined Jotham Smith in the deed to William of one half of the premises mortgaged to him, and released all his interest therein, the mortgage of that half was thereby discharged, and Jotham's seisin thereof had effect by relation from the time of the execution of the original deed from Eastman, and the demandant became dowable of that half of the land; but Stanley released only one half of the land mortgaged; he received no payment in fact of the debt secured by the mortgage of the other half, except by the land; and the result is, that the demandant is entitled to judgment for her dower in one undivided half of the premises, and no more.

Defaulted as agreed by the parties.

Judgment for dower in one moiety.

SHEPLEY, C. J., and HOWARD, RICE, and CUTTING, JJ., concurred.

WIFE HAS NO RIGHT OF DOWER IN LAND PURCHASED BY HUSBAND AND MORTGAGED BACK contemporaneously by the husband and wife to the grantor to secure payment of the purchase money: *Esalava v. Lepretre*, 56 Am. Dec. 266.

WIDOW IS NOT ENTITLED TO DOWER WHERE HUSBAND MORTGAGES LAND, or conveys it to trustees to secure the purchase money: See *Wheatley's Heirs v. Calhoun*, 37 Am. Dec. 654, note 659, where other cases are collected.

RELEASE OF DEBT SECURED BY MORTGAGE IS RELEASE OF MORTGAGE: See *Smith v. Durell*, 41 Am. Dec. 732, note 733, where other cases are collected.

CHAPMAN v. TWITCHELL.

[37 MAINE, 59.]

ADMISSIONS OF THIRD PERSON ARE ADMISSIBLE IN EVIDENCE against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact. The party is bound, in such cases, by the declarations of the person referred to, in the same manner and to the same extent as if they were made by himself.

TRADITIONARY EVIDENCE IS INADMISSIBLE TO PROVE BOUNDARY OF PRIVATE ESTATE, when not identical with one of a public nature.

DIAGRAMS OR DECLARATIONS OF DECEASED PERSON CAN NOT BE ADMITTED IN EVIDENCE for the purpose of proving the limits or boundaries of lots, between individuals, where he was never the owner or possessor of the lots.

TRESPASS *quare clausum fregit* for cutting down and carrying away pine trees. The cutting was admitted, and the question was one of boundary. The defendant introduced one Walker, who testified that he requested the plaintiff to show him where the north-east corner of the land was; that the plaintiff told him that Twitchell could show him where the corner was; that Twitchell went and showed the corner, and the white-pine stump which was claimed as the corner by the defendant. This evidence was admitted over the objection of the plaintiff. The plaintiff, having proved that one Joseph Twitchell, long since dead, was the surveyor who originally ran the lines in the town of Bethel, in which the lot in question was situated; that said Joseph Twitchell was the father of Eli Twitchell, who was also long since deceased; and that said Eli had been the keeper of the records of the town of Bethel—introduced as a witness one M. B. Bartlett. A plan was exhibited to this witness having upon it this certificate: "This plan is the original one taken by Captain Joseph Twitchell, it being the first plan of the town of Bethel. Eli Twitchell." The witness said he believed this to be the plan he had seen in the possession of Eli Twitchell. He

knew the signature to be the handwriting of said Eli, and had often seen him consulting this plan at the town clerk's office in Bethel. The plaintiff then offered to introduce the plan, but it was objected to by the defendant and excluded by the court. There was a verdict for the defendant, and the plaintiff excepted.

Shepley and Dana, for the plaintiff.

May, for the defendant.

By Court, WELLS, J. The question between the parties was, how far eastward lot numbered eighteen extended. The defendant contended that one of its eastern bounds was a white-pine stump. James Walker, introduced by the defendant, testified that he and others went to the plaintiff, and asked him to show the north-east corner of the land bounded; that he said Twitchell could show them where the corner was; that Twitchell went and showed them the corner and the white-pine stump. It does not appear by the exceptions whether Twitchell was the defendant, or some other person, but it is said in argument that he was not the defendant. Twitchell made no declaration that what he pointed out was the boundary. It is not stated that he said anything, but it may be implied that he was not entirely silent while he performed the acts. The language of the plaintiff would indicate that confidence could be reposed in the knowledge and fidelity of Twitchell. If Twitchell had gone with Walker and had pointed out the boundary, and the information concerning what he did had been communicated to the plaintiff, who should admit the accuracy of Twitchell, no doubt could exist that such an admission could be legally received in evidence. What the plaintiff did say is equivalent to admission that Twitchell knew the boundary, and would point it out truly. An admission that one will perform an act correctly is very nearly allied to an admission that it has been so done, after it has taken place.

The admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact. In such cases the party is bound by the declarations of the person referred to, in the same manner and to the same extent as if they were made by himself: 1 Greenl. Ev., sec. 182; *Williams v. Innes*, 1 Camp. 364.

In the present case the conversation was between the plaintiff and the witness Walker. But it is to be regarded as an admission, and on this principle it is to be received, although not

made to the party to the suit: *Brock v. Kent*, 1 Camp. 366, in note.

The testimony of the acts of Twitchell was properly admitted. The estimate of timber west of the white-pine stump, and the certificates of it, do not appear to have any bearing upon the question at issue; they are immaterial facts, and could not in any manner have prejudiced the rights of the plaintiff.

The authenticity of the plan offered in evidence by the plaintiff could not be established by the declarations of Eli Twitchell. The fact that he had long since died would not authorize their reception any more than the declarations of deceased witnesses in ordinary cases. Assuming that the plan, which is not exhibited with the papers in the case, purports to delineate the lines of the several lots in Bethel, and that the certificate of Eli Twitchell made upon it is an affirmation of their correctness, it could not be regarded as legally admissible. Traditionary evidence may be admissible in relation to the boundaries of parishes, manors, and the like, which are of public interest, and generally of remote antiquity, but it is inadmissible for the purpose of proving the boundary of a private estate when not identical with one of a public nature: 1 Greenl. Ev., sec. 145. It would be a new element in the law of evidence to admit the diagrams or declarations of deceased persons for the purpose of proving the limits or boundaries of lots between individuals, when those persons were never the owners or possessors of them.

Exceptions overruled.

SHEPLEY, C. J., and TENNEY, RICE, and APPLETON, JJ., concurred.

DECLARATIONS OF THIRD PERSONS, ADMISSIBILITY OF: See *Lyon v. Bolling*, 48 Am. Dec. 122, note 129; *Stovall v. Farmers' and M. Bank*, 47 Id. 85; *Padgett v. Lawrence*, 40 Id. 232; *Craig v. Craig*, 24 Id. 390, note 395, where other cases are collected. The principal case is cited in *Rosenbury v. Angell*, 6 Mich. 521, as one of two American cases decided since the publication of Greenleaf on Evidence, in which section 182 of that work is quoted with approbation.

BARTLETT v. BLAKE.

[37 MAINE, 124.]

BURDEN OF PROVING FRAUD IS UPON PARTY CHARGING IT.

DELIVERY OF CHATTEL TO VENDEE BEFORE SEIZURE THEREOF UNDER EXECUTION against the vendor is sufficient to vest title in the vendee as against the creditor levying the execution.

INSOLVENCY OF VENDOR AT TIME OF SALE OF UNFINISHED CHATTEL, and his treating it after the sale as if it were his own, do not furnish conclusive proof that the sale was fraudulent, although they would be strong indications of fraud if unexplained.

CLAUSE IN BILL OF SALE OF UNFINISHED CHATTEL allowing the vendee the right to take the same at will does not authorize the vendee, at his election, to repudiate the contract and annul the sale.

TRESPASS against a deputy sheriff for taking the plaintiff's wagon. The facts are stated in the opinion.

L. Whitman, for the defendant.

Bartlett, pro se.

By Court, **SHEPLEY, C. J.** The suit is trespass for a wagon. The plaintiff claims title by purchase from John G. Robinson, by bill of sale bearing date on June 1, 1853. The defendant, as a deputy of the sheriff, seized and sold it as the property of Robinson, on July 30, 1853, by virtue of an execution issued on a judgment recovered in 1851 by Ebenezer C. Shackley against Robinson. The description of the property in the bill of sale is, "one new side-spring wagon-wood, including the running gear and the irons for the same; and the said Robinson agrees to iron, paint, and trim the wagon, and put it in good complete running order in July next." The plaintiff appears to have paid by delivering up a note and discharging an account against Robinson.

The objections made to the plaintiff's title are, that there was no sufficient delivery, and that the sale was fraudulent as against creditors. There does not appear to have been any delivery when the bill of sale was made.

Robinson testifies that on June 25th he delivered part of the property to the plaintiff, who accepted it; and that about ten days afterwards he met him in the highway, when he was carrying the other part to him, and was directed by him to leave it with the first part, which had been previously left in the shop of Joshua B. Stuart to be ironed; and that he did so. This was a sufficient delivery to vest the title in the plaintiff before the seizure on execution.

The elements of fraud principally relied upon are, the insolvency of Robinson; his treatment of the property as his own after the sale; its sale in an unfinished state; and a clause in the bill of sale allowing the plaintiff "the right to take the same at will."

The case presented does not appear to be one in which the owner of property, being about to fail or to become known to

be embarrassed, finds it convenient to dispose of his property to prevent its attachment or seizure by his creditors. So far as the condition of Robinson is disclosed, it would rather appear that he had been insolvent, and known to be so, before he commenced to make the wagon. When a person known to be insolvent proceeds to manufacture an article, and to sell it in an incomplete state to a favored creditor in payment of a debt due, the indication of fraud is not so strong as it would have been if he had continued in credit until he found it failing, and himself under the necessity of making a disposition of his property to prevent its attachment or seizure.

Robinson's treatment of the property after the sale as if it were his own would have been a strong indication of fraud if not explained. By the contract he was to have the wagon finished, and the plaintiff was to make advances to him for that purpose, but was not to pay the bills to those employed. Robinson's engagements to pay from his own resources the blacksmith and painter do not appear to have been inconsistent with the contract and the sale of the unfinished materials. The right of the plaintiff to take the wagon at pleasure might be inserted to enable him to avoid a loss in case Robinson should fail to have it finished properly, or in case any of his creditors should attempt to take it before it was finished. It does not authorize such a construction of the contract as would allow the plaintiff, at his election, to repudiate the contract and annul the sale. The burden of proof to establish the alleged fraud is upon the defendant, and it is not sufficient to raise suspicions.

Defendant defaulted.

HOWARD, RICE, HATHAWAY, and CUTTING, JJ., concurred,

DELIVERY, WHAT SUFFICIENT TO PASS TITLE: See *Messer v. Woodman*, 53 Am. Dec. 241, note 248, where other cases are collected.

BURDEN OF PROVING FRAUD IS ON PARTY ALLEGING IT: *Briscoe v. Bronaugh*, 46 Am. Dec. 108, note 120, where other cases are collected.

GURNEY v. TUFTS.

[37 MAINE, 130.]

MAGISTRATE'S WARRANT OF COMMITMENT MUST ON ITS FACE SHOW HIS AUTHORITY to commit, in order to justify the officer who executes it. **OFFICER WILL BE PROTECTED IN OBEYING PRECEPT SUFFICIENT IN POINT OF FORM** and issued by a court or magistrate having jurisdiction of the subject-matter.

WHERE WARRANT SHOWS THAT MAGISTRATE HAD NO JURISDICTION over the person or over the offense, the officer is not obliged to make service of it; and in doing so, he becomes a trespasser.

MAGISTRATE HAS NO AUTHORITY TO ORDER OFFENDER TO BE IMPRISONED until he pay a fine or be otherwise discharged by due course of law, in a case where the law only authorizes the magistrate to sentence the offender to stand committed for thirty days in default of payment of the fine.

OFFICER IS NOT PROTECTED BY PROCESS ON FACE OF WHICH IT APPEARS that the person held under it was never arrested or arraigned; that he never pleaded to any complaint, nor suffered a default; and that no proof of his guilt had been offered nor any trial been had.

Writ de homine replegiando. The opinion states the case.

Shepley and Hayes, for the plaintiff.

Wilkinson, for the defendant.

By Court, APPLETON, J. The writ of personal replevin is given by revised statutes, chapter 142, to any one imprisoned, restrained of liberty, or held in duress, for the purpose of testing the legality of such imprisonment, restraint of liberty, or duress, and if proved to be illegal, the plaintiff is entitled to his discharge and to his costs.

The defendant justifies the arrest of the plaintiff, as a constable, by virtue of a warrant issued by the police judge of Saco against him; and the question is, whether such judge had jurisdiction over the subject-matter of the complaint set forth therein, and over the person of the plaintiff, or whether a want of jurisdiction in those respects, or either of them, is apparent on the face of the proceedings.

The warrant must on its face show the magistrate's authority to commit, for no presumptions are to be made in favor of his jurisdiction. However important it may be that an officer should be protected, it should never be forgotten that the citizen has his rights, and that they are rights under the law and entitled to its protection. When an officer acts under the authority of a magistrate having jurisdiction, and that fact is disclosed on the face of his precept, he should not be held responsible for the previous omissions of such magistrate. He should not be required to ascertain or determine the validity of prior proceedings, or to look beyond the command of his precept. But if the magistrate issues precepts or orders arrests for acts not known to the law as offenses; if he imposes illegal punishments, as if he commands a plain and obvious violation of the law, he can, when thus transcending the bounds of his authority, afford no more protection to an officer than could one

not a magistrate. "If a warrant," says Reeve, C. J., in *Gru-mon v. Raymond*, 1 Conn. 45 [6 Am. Dec. 200], "which is against law be granted, such as no justice of the peace or other magistrate, high or low, has power to issue, the justice who issues and the officer who executes it are liable in an action of trespass. When there is a want of jurisdiction over the person, as in the *Marshalsea Case*, 10 Co. 70, or over the cause, as if a justice should try a man for murder, or over the process, as in the case ruled from Hobart, it is the same as though there was no court. It is *coram non judice*." It may be difficult in all cases to distinguish between those cases where the acts of an officer are justified by his precept and those in which they are not, but the distinction none the less exists.

If precepts sufficient in point of form are issued by a court or magistrate having jurisdiction of the subject-matter, the officer will be protected: *Sandford v. Nichols*, 13 Mass. 285 [7 Am. Dec. 151]. Erroneous process is the act of the court; and when set aside, a party may justify under it: *Blanchard v. Goss*, 2 N. H. 491. "Those defects in the process which are amendable and which do not render the process absolutely void, although apparent on its face, do not render the officer or party liable. It is only jurisdictional defects, and such as can not be amended, which render the officer liable, when they are apparent on the face of the process:" *Per Willard, J., in Dominick v. Eacker*, 8 Barb. 17; *Harrington v. People*, 6 Barb. 607. In *Houlden v. Smith*, 14 Ad. & El., N. S., 852, Patterson, J., in reference to the liability of the magistrate by whom process has been issued, where he had no jurisdiction, says: "Here the facts of the case which were before the defendant, and which could not be unknown to him, showed that he had not jurisdiction; and his mistaking the law as applied to these facts can not give *prima facie* jurisdiction, or the substance of any." The warrant may have been issued without complaint or previous process; it may be defective in form, and liable to abatement; it may have been fraudulently obtained, and may be void so far as regards the complainant or the magistrate; and they may both be liable to the party injured; yet if the warrant is legal on its face, and shows an apparent jurisdiction, the officer will be protected when acting in obedience to his precept: *State v. Weed*, 21 N. H. 268 [53 Am. Dec. 188]. But when the warrant shows that the magistrate had no jurisdiction over the person or over the offense, the officer is not obliged to make service; and in so doing, he becomes a trespasser: *Pearce v. Atwood*, 13 Mass 344.

The warrant of commitment under which the defendant justifies, after reciting the substance of the complaint, proceeds as follows: "And a search warrant was issued upon said complaint on said eleventh day of July, and on said day was returned to said court by Thomas P. Tufts, one of the constables of said town of Saco, to whom it had been committed for service, with a return thereon, certifying that he had seized certain spirituous and intoxicating liquors, and forthwith summoned John Gurney, the owner or keeper thereof, by reading the warrant to him in his presence and hearing, and the said John Gurney did not appear and show cause why said liquors should not be destroyed and he be adjudged and held to pay a fine and costs, and did not appear or claim said liquors. And said John Gurney, by the consideration of said court, is sentenced to pay a fine to the use of said Saco of twenty dollars and costs of prosecution, taxed at four dollars and ten cents, and stand committed until the same be paid." The warrant further orders the destruction of the liquors and the commitment of Gurney to jail, and that the keeper of said jail should keep him "until he performs said sentence, or be otherwise discharged by due course of law." The imprisonment of the plaintiff is required to be until he perform said sentence, or be otherwise discharged by due course of law. The magistrate had clearly no authority, even if he had jurisdiction of the person, to impose any such sentence, or to commit for a failure to comply therewith. By the act of June 2, 1851, c. 211, sec. 11, the magistrate is only authorized to sentence the owner or keeper of liquors to "stand committed for thirty days in default of payment, if in the opinion of the court said liquors shall have been kept or deposited for the purposes of sale." In *Robson v. Spearman*, 3 Barn. & Ald. 493, which was an action of trespass against the magistrate, the commitment of the plaintiff was until he should pay the sum due, and legal and accustomed fees, or until he should otherwise be discharged by due course of law. The magistrate, by the statute under which he acted, was empowered only to commit for three months, unless the money be sooner paid. "I am of opinion," says Abbott, C. J., "that the warrant in this case was illegal, not being such as the justice had authority to make. It was his duty to have pursued the words of the statute. If he had so done, it would have given the party committed the option either of paying the money, or staying three months in prison and being thereby altogether discharged from the payment. This warrant is for his imprisonment till he

shall pay the money, and deprives the party of that advantage. The difference is a most material one, and it gives the party committed a right of action against the magistrate." This decision would be directly in point were the suit against the magistrate instead of the officer.

The plaintiff in this case was never arrested. He was never arraigned, nor has he ever pleaded to any complaint. He has never suffered a default. No proof of his guilt has been offered, nor has any trial been had. The plaintiff has been summoned to appear before the magistrate who received the complaint, and not appearing, he has been sentenced without any trial or adjudication of his guilt. His presence is expressly negatived. No authority over the person is shown. The sentence imposed is one not authorized by the statute, and if it were, it would be in contravention of the bill of rights, which gives to every citizen the right "to have a speedy, public, and impartial trial." So far as the authority of the magistrate is concerned, the sentence might as legally have been to perpetual imprisonment as in the present form. All this is apparent on the face of the process, and is thus brought home to the knowledge of the officer. In *Savacool v. Boughton*, 5 Wend. 170 [21 Am. Dec. 181], it was held by Marcy, J., after a full and careful examination of the authorities, "that if a mere ministerial officer execute any process, upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it." The same doctrines were affirmed in *Churchill v. Churchill*, 12 Vt. 661.

Defendant defaulted.

TENNEY, J., concurred. SHEPLEY, C. J., and HOWARD, J., concurred in the result.

OFFICER IS PROTECTED BY PROCESS, THOUGH IT IS VOIDABLE FOR IRREGULARITY: *State v. McNally*, 56 Am. Dec. 650, note 655, where other cases are collected.

TEST TO DETERMINE WHETHER PROCESS IS VOID OR NOT: See *Byers v. Fowler*, 54 Am. Dec. 271.

OFFICER SERVING PROCESS, WHEN PROTECTED: See *State v. Weed*, 53 Am. Dec. 188, note 202, where other cases are collected.

STATE v. GURNEY.

[87 MAINE, 156.]

LEGISLATURE MAY REGULATE BY LAW SALE OF ANY ARTICLE the use of which would be detrimental to the morals of the people.

FROM APPELLANT SEEKING TRIAL BY JURY NOTHING MORE THAN REASONABLE SECURITY for his appearance can be rightfully required in a criminal prosecution.

APPEAL IN ITSELF LEGAL AND CORRECT IS NOT INVALIDATED by the fact that the magistrate who granted it compelled the appellant to give bond for his appearance in an amount greater than could be lawfully required of him. The law will in such case afford a remedy for the unlawful act of the magistrate, but the appeal will still be valid.

ACT IMPOSING DOUBLE PENALTY UPON ONE WHO APPEALS, in case he is convicted by a jury in the appellate court, is unconstitutional. But the appellate court may, after conviction by the jury, impose the single penalty, where such penalty appears to be appropriate, and the law does not state by what tribunal it may be imposed.

PROSECUTION under the act of 1851, for the suppression of drinking-houses and tippling-shops. The sixth section of the act provided, among other things, that "if any person shall claim an appeal from a judgment rendered against him, by any judge or justice, on the trial of such action or complaint, he shall, before the appeal shall be allowed, recognize in the sum of one hundred dollars, with two good and sufficient sureties, in every case so appealed, to prosecute his appeal, and to pay all costs, fines, and penalties that may be awarded against him upon a final disposition of such suit or complaint. And before his appeal shall be allowed, he shall also, in every case, give a bond with two other good and sufficient sureties, running to the town or city where the offense was committed, in the sum of two hundred dollars, that he will not, during the pendency of such appeal, violate any of the provisions of this act." The other facts are stated in the opinion.

Shepley and Hayes, for the defendant.

Evans, attorney general, submitted without argument.

By Court, WELLS, J. The respondent was charged in a complaint, made to the judge of the municipal court of Saco, with a violation of the law by selling spirituous and intoxicating liquors. Upon conviction in the municipal court, he appealed, was tried by the jury, and found guilty. He now moves in arrest of judgment, for two reasons: 1. Because the provisions of the act upon which said complaint is founded are in conflict

with the constitution of this state; 2. Because no legal sentence can be imposed by the court.

By the constitution of this state, the legislature "shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor to that of the United States:" Art. 4, pt. 3, sec. 1. Under this branch of the constitution, the legislature would have a right to regulate by law the sale of any article the use of which would be detrimental to the morals of the people. One of the incidents of civil society is self-protection, and this object can not be effected without necessary police regulations. It is unnecessary to determine the question whether an importer of foreign liquors could lawfully sell them when prohibited by a statute of the state. For the defendant sold by retail in the town of Saco, and must be regarded as liable to the penalty prescribed by a statute which the legislature had the constitutional authority to enact.

But it is contended that the provisions of the sixth section of the act of 1851, upon which the complaint was founded, are unconstitutional. The respondent had a right to a trial by jury, and to obtain it, it was necessary that he should appeal. If he had, upon taking the appeal, claimed the right to do so, and refused to have complied with the objectionable provisions, he would have placed himself in a position to contest the constitutionality of them. Nothing more than reasonable security for his appearance should be required of an appellant seeking a trial by jury. By the revised statutes, c. 170, sec. 8, one may appeal in a criminal case, and the justice or judge of the municipal court shall grant the appeal, and order the party "to recognize in a reasonable sum, not less than twenty dollars, with sufficient sureties for his appearance, and for prosecuting his appeal, and he shall stand committed till the order is complied with." Thus he may appeal, and whether he goes into jail or enters into a recognizance, he can claim a trial by jury. If the sixth section of the act before mentioned was unconstitutional and void, no such objection would lie to the provisions of the revised statutes, and the respondent might have claimed an appeal in conformity with them. They would apply to all cases where one might claim an appeal under subsequent statutes, if they were not changed. If, then, the sixth section should be considered void, that infirmity would not infect the residue of the statute, and render its other requirements inoperative.

The general statute would supply any such defect, and applying to all cases of a similar character without exception, would prescribe the terms of an appeal.

But the respondent complied with the conditions imposed upon him, and his appeal was allowed. The appeal was lawful, and the case was properly entered and prosecuted in the appellate court, and although conditions were prescribed more rigorous than the constitution might justify, such requisitions would not annul the appeal. If a magistrate, before he would grant an appeal, should require the payment of an unlawful sum of money, and the appellant should pay it, the appeal would be valid, and the law would furnish a remedy for the unlawful act. The requirement of unlawful bonds must stand upon the same ground; they would be void, while an appeal in itself legal and correct would be valid.

In the case of *Greene v. Briggs*, 1 Curt. 311, the goods were replevied, and there was no appeal. The order of forfeiture was held to be "invalid for two reasons: 1. Because there was no sufficient complaint; and 2. Because the plaintiff was deprived of his property by a criminal prosecution, in which he neither had nor could have a trial by jury, without submitting to conditions which the legislature had no constitutional power to impose." If the plaintiff had submitted to such conditions, the case would have been very different from that which was presented to the consideration of the court.

But it is also contended that no legal sentence can be imposed upon the respondent. The sixth section of the act of 1851 provides: "And in the event of a final conviction before a jury, the defendant shall pay and suffer double the amount of fines, penalties, and imprisonment awarded against him by the justice or judge from whose judgment the appeal was made."

The respondent had a right secured to him by the constitution of a trial by jury, and to enjoy it, he must appeal. If he desired to be free from restraint or confinement, he must give reasonable security for his appearance at the trial. The language of the constitution is, that "excessive bail shall not be required." Every condition beyond what is necessary to secure the prosecution of the appeal must be regarded as objectionable. The legislature has no power to impair a right given by the constitution; it belongs to the citizen, untrammelled and unfettered. If the legislature can impose penalties upon the exercise of the right, they may be so severe and heavy as practically to destroy

it. The provision under consideration would have the effect, as it was doubtless intended, to check appeals. It is an additional punishment inflicted upon one who may be found guilty, for appealing. It may be said that if a man is guilty, he ought not to appeal. But through the imperfection of human tribunals, acting upon evidence, the guilt or innocence of the accused can not be made absolutely certain. An innocent man may be declared guilty by a verdict of a jury. And if he is threatened with a double punishment in case of a final conviction, he might be deterred from appealing by the uncertainty of the result. But the constitution guarantees to the respondent, whether innocent or guilty, a right of trial by jury, without any qualifications or restrictions. In *Greene v. Briggs*, 1 Curt. 327, it was said by Judge Curtis: "I find it equally difficult to reconcile the increase of penalties upon a conviction after an appeal with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offense. Certainly it can not be said that the offense is aggravated by the accused having claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment of thirty days, inflicted? If the offense remains the same, and the offender has done nothing but claim an appeal in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right?"

This provision of the statute must be regarded as an unnecessary restraint upon the right of appeal, and therefore in conflict with the constitution, and inoperative and void. But the fourth section of the act provides that the offender "shall forfeit and pay on the first conviction ten dollars and the costs of prosecution, and shall stand committed until the same be paid," etc. This appears to be an appropriate fine, and it is not stated by what tribunal it may be imposed, and any one having jurisdiction may exercise that power. As the double penalty can not rightfully be inflicted, the single one must remain, especially as its imposition is not confined by the statute to the action alone of a justice of the peace or judge of a municipal court. This court has therefore authority to impose a legal sentence.

· Motion overruled.

SHEPLEY, C. J., and TENNEY and HOWARD, JJ., concurred.

LEGISLATURE MAY REGULATE MANNER OF ENJOYING PROPERTY, where the public interests are affected: See *Preston v. Drew*, 54 Am. Dec. 638, note 642, where other cases are collected.

TRIAL BY JURY: See *Saco v. Wentworth*, *infra*, and note, where other cases are collected.

INHABITANTS OF SACO *v.* WENTWORTH.

[57 MAINE, 165.]

PHRASE "BY THE LAW OF THE LAND" MEANS BY PROCESS AND PROCEEDINGS of the common law, by which process and proceedings the accused has the right to know the charge, in the whole form and substance, against him, to contest it, and if not proved to the satisfaction of a jury, to demand an acquittal.

EVERY PERSON PROSECUTED FOR CRIME HAS CONSTITUTIONAL GUARANTY OF TRIAL BY JURY, and no law can be enacted which shall take away this right or interpose such impediments to its exercise as unnecessarily or unreasonably to impair it.

ACT WHICH MAKES IT DIFFICULT FOR ACCUSED TO OBTAIN TRIAL BY JURY, beyond what public necessity requires, impairs individual rights, and is inconsistent with the provision of the constitution which guarantees their protection.

ACT REQUIRING CONDITIONS FOR PURPOSE OF PREVENTING TRIAL BY JURY is at war with the spirit of the constitution, and so far as it deprives one of this means of protection, it is void.

STATUTE REQUIRING ACCUSED, AS PREREQUISITE FOR OBTAINING JURY TRIAL, to give a bond in a large penal sum, conditioned to be void if he shall abstain from all violations of the provisions of the act during the pendency of the appeal taken for the purpose of securing a trial by jury, contravenes the provision of the constitution which guarantees to the accused a speedy trial by jury, and is therefore void; and no action can be maintained on such a bond.

DEBT on a bond given by the defendants to the plaintiffs, for two hundred dollars, conditioned that the principal obligor should not violate any of the provisions of the act of 1851, "for the suppression of drinking-houses and tippling-shops," during the pendency of an appeal by him made from the sentence of the municipal court of Saco, on a conviction before that court for selling spirituous liquors contrary to said act. The other facts are stated in the opinion.

Shepley and Hayes, for the defendants.

Emery and Loring, for the plaintiffs.

By Court, TENNEY, J. The bond in suit was given by the defendants as one of the conditions to obtain an appeal from a sentence to pay a fine of ten dollars, and costs of prosecution,

awarded against the principal obligor by the judge of the municipal court of the town of Saco for a violation of the statute of 1851, c. 211, sec. 4, as required by section 6 of the same chapter. It appears from the judgment of the court which passed the sentence, that when the bond was executed the party convicted protested that it was given under duress for the purpose of securing a trial by jury.

The proposition in defense principally relied upon, and the only one which we propose to examine, is, that the requirement of the statute for such a bond, as an indispensable condition of an appeal, in order to secure a trial by jury, is unconstitutional; and that the requirement and the bond are void.

“In all criminal prosecutions the accused shall have a right to be heard by himself and his counsel, or either, at his election; to demand the nature and cause of the accusation, and have a copy thereof; to have a speedy, public, and impartial trial, and except in trials by martial law or impeachment, by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property, or privileges, but by the judgment of his peers or the laws of the land. No person, for the same offense, shall be twice put in jeopardy of life or limb:” Constitution of Maine, art. 1, secs. 6, 8.

“The law of the land,” as used in the constitution, has long had an interpretation which is well understood and practically adhered to. It does not mean an act of the legislature; if such was the true construction, this branch of the government could at any time take away life, liberty, property, and privilege without a trial by jury. The words just quoted from the constitution are substantially the same as those found in chapter 29 of Magna Charta, from which they have been borrowed, and incorporated in the federal constitution and most of the constitutions of the individual states. Lord Coke, in commenting on this chapter, says: “No man shall be disseised, etc., unless it be by the lawful judgment, that is, a verdict of equals, or by the law of the land; that is (to speak once for all), by the due course and process of law:” 2 Co. Inst. 46. Blackstone says: “And first, it (the law) is a rule, not a transient, sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal:” 1 Bla. Com. 44. Chancellor Kent says: “It may be received as a self-evident proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned,

or disseised of his freehold or liberties or estate, or exiled or condemned, or deprived of life, liberty, or property, unless 'by the law of the land, or the judgment of his peers.' The words 'by the law of the land,' as used in Magna Charta in reference to this subject, are understood to mean due process of law; that is, by indictment, or presentment of good and lawful men:" 2 Kent's Com. 9, lect. 24. Judge Story says: "The clause 'by law of the land' in effect affirms the right of trial according to the process and proceedings of the common law:" 3 Story's Const., sec. 1783; *Dartmouth College v. Woodward*, 4 Wheat. 518.

By the process and proceedings of the common law, the accused has the right to know the charge in the whole form and substance against him, to contest it, and if not proved to the satisfaction of a jury, to demand an acquittal. Every person prosecuted for crime having the constitutional guaranty of a trial by jury, no law can be enacted which shall take it away, or interpose such impediments as unnecessarily or unreasonably to impair it. It is true, the public interests are not to be sacrificed by too great favor shown to those charged with crime. The state is entitled to a full vindication of its rights against such as are supposed to be transgressors of the criminal law. This necessarily imposes restraints upon the accused before a trial and conviction, and these may operate to his injury. He is to be treated as a suspected person because accused, so far that his person may be present when he shall be required to answer to the offense alleged. To secure his trial, the party prosecuted may be arrested; and although he is secure under the constitution from the obligation to give unreasonable bail, his penury and want of friends, perhaps in a strange land, or a loss of confidence in those who know him, by his previous misconduct, may lead to his imprisonment for a longer or shorter period, or to great trouble and expense in procuring bail, which is entirely reasonable. This is one of the unfortunate incidents attending criminal prosecutions and trials for alleged offenses. But this inconvenience and hardship does not necessarily take away or abridge the right of a trial by jury, under statutes which are not in conflict with the constitution.

The accused shall have a speedy trial by jury, and it is only by "the law of the land," as jurists have expounded the terms, that he can be deprived of life, liberty, property, and privileges. It is the duty of the government to provide such tribunals, and give every proper opportunity for trials before them, consistent

with the preservation of the public good, to all who demand them.

An act of the legislature which takes away this privilege of trial by jury directly is tyrannical, and a palpable violation of the constitution; one which renders it difficult to obtain beyond what public necessity requires, impairs individual rights, and is inconsistent with this provision for their protection. If an act requires conditions for the purpose of preventing a trial by jury, the spirit of such a provision is at war with the spirit of the constitution, and so far as it deprives one of this means of protection, it is void.

We think it would be regarded an anomaly in criminal legislation if it should be provided that upon an indictment of a grand jury, against one for a crime, the trial should be by the court, unless the accused should demand a trial by jury, and should, as a prerequisite for obtaining it, be compelled to give a bond, with good and sufficient sureties, in a large penal sum, conditional to be void if he should abstain from the commission of all offenses against the laws for a given period, longer or shorter. It could not be contended that such a condition would not be in opposition to the provision that in prosecutions for crime the accused should have a speedy trial by jury. Such a condition could have no reference to the public interest, that punishment should follow the conviction of the crime imputed. When charged with a criminal violation of law, the party so accused should be brought to trial as soon as circumstances will render it expedient; but that he is thus charged is no good reason why he should be required to give security against the commission of future crime, more than any other person unsuspected of the design to break the laws, before he can have a trial by jury. A bond to prevent any infraction of the law, after the commencement of the prosecution, for its previous violation, and an appeal from a sentence of a justice of the peace therefor, may with equal propriety be required to extend to other and all crimes, and for an indefinite period of time.

When a demand for an appeal from a sentence awarded by a court, not attended by a jury, is made, it is one step only towards obtaining such a trial, if it is desired by the party accused; and conditions in no wise conducive to the great end of the government, in punishing offenders for crimes supposed to have been committed, can be required at that time with more propriety than at a subsequent stage of the proceedings, when a jury is about to be impaneled. After an appeal from such a

tribunal, the appellant stands as he does after an indictment by the grand jury of a court, when a jury of trials is to judge of his innocence or guilt. In both instances he is shielded by the presumption of a freedom from guilt till he shall be proved to have committed the offense whereof he is charged.

That such a bond as that now in suit should be required as a condition to the privilege of a trial by jury, upon appeal, does impair the right secured by the constitution. The provision can not be intended to bring an actual offender to trial and to punishment, but looks entirely to the future, with the design of its authors, to secure the public from danger arising from criminal acts not yet committed, by presenting an inducement to one standing charged only, to give the supposed indemnity as the price of a trial before that tribunal, which the constitution proclaims that he shall always enjoy.

"No person, for the same offense, shall twice be put in jeopardy of life or limb." This is another great privilege secured by the common law, as well as by the constitution. "The meaning of it is, that the party shall not be tried a second time for the same offense after he has once been convicted or acquitted of the offense charged, by a verdict of a jury, and judgment has passed thereon for or against him:" 3 Story's Const., sec. 1781.

The bond in this case, as has been before remarked, refers exclusively to future violations of the statute referred to. If it has been broken, as it is admitted that it has been, by the principal obligor therein, he is amenable to the law in a criminal prosecution, precisely as he would be if it had not been given. It furnishes no immunity whatever from a sentence for a crime. Upon such a sentence or other forfeiture, which may be awarded and decreed upon a sufficient complaint and trial, which may in every respect be according to the law and the constitution, he is still holden on the bond with his sureties, according to its terms. He is liable to a judgment for the penal sum therein; and it is very doubtful whether, in such a case, any rule could be applied by which it should be determined that execution should issue for a less sum than the judgment itself. If execution should be awarded against him under our general laws applicable to judgments and executions, his property and his liberty are exposed, and by force of the execution, if served according to its precept, he will be deprived of one or the other. All this will result or may take place if the provision which we are considering is valid according to the constitution, for the reason that he was

unable to have a trial by a jury according to the law of the land till he had given the bond, and thereby laid himself liable to a punishment under it for offenses which he had not committed when it was executed, but which he might afterwards commit, in addition to the fines and penalties and forfeitures to which he might be exposed under the provisions of the act itself.

In the trial of the action on the bond, which is really for the offense of having violated some provision of the same statute referred to therein, after the bond was executed and while the appeal was pending, he has not the nature and the cause of the accusation set out in the full, clear, precise, and technical form required by the constitution. So scrupulous have the courts of the common law always been, that the charge of crime should be so described in the prosecution therefor that any material defect has always operated in favor of the accused; and if any allegation necessary to constitute the offense has been omitted, all amendments have been denied, and he has been discharged.

On the bond he is tried as in civil actions generally, without the securities which are thrown around him by the rules which prevail in their full integrity under a criminal accusation. He is exposed to a greater penalty, perhaps, than that which he would incur if charged with the same offense as a crime.

We are reluctantly brought to the conclusion that the provision in the statute of 1851, c. 211, sec. 6, requiring that a bond, such as is described, shall be given by a party sentenced by a justice of the peace or by a judge of a municipal or police court to pay a fine and costs, as one of the conditions before an appeal can be allowed, is in violation of the provisions of the constitution of this state which have been referred to, and that the provision itself is inoperative and void: *Greene v. Briggs*, 1 Curt. 311.

Plaintiffs nonsuit.

SHEPLEY, C. J., and WELLS, HOWARD, and APPLETON, JJ., concurred.

TRIAL BY JURY, HOW FAR LEGISLATURE MAY REGULATE RIGHT OF.—In the note to *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 193, it was shown that the legislature may prescribe reasonable regulations affecting the exercise of the right of trial by jury. In a late case in Massachusetts, *Foster v. Morse*, 132 Mass. 354; S. C., 42 Am. Rep. 438, it was decided that a statute which provided that a party in a civil action should not be entitled to a trial by jury, unless he filed, within the time therein prescribed, a notice that he desired such trial, was not unconstitutional, as impairing the right of trial by jury. Morton, C. J., in delivering the opinion of the court in that case, said:

"This requirement does not deprive him of his right to a trial by jury, but regulates the mode in which this right shall be enjoyed and used. It requires a party to use reasonable diligence in electing whether he will exercise his right to have a trial by jury. If he fails to file a notice of his desire to insist upon this right, he waives the right." A law requiring the defendant in a civil action to be defaulted unless he files, within ten days of the return day of the writ, an affidavit that he has a good defense is not an unreasonable restriction of the defendant's right to a trial by jury: *Hunt v. Lucas*, 99 Mass. 404. And neither is a law requiring a party to a civil action, on appealing from a judgment of a justice of the peace, to give bonds to prosecute his appeal, or give bail for his appearance: *Hapgood v. Doherty*, 8 Gray, 373. An act which gives any person convicted before a justice of the peace or a police court the right to appeal to the superior court, and to have a trial by jury, is not unconstitutional by reason of its providing that, if he fails to prosecute his appeal, he shall be defaulted, and that the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted in that court: *Commonwealth v. Whitney*, 108 Mass. 5. An act providing that the judge of a city court shall render judgment without a jury, when no issuable defense on oath is filed, is not unconstitutional, as depriving the party of his right to a jury trial: *Dortic v. Lockwood*, 61 Ga. 293. Warner, C. J., delivering the opinion of the court in this case, said: "This act did not deprive the defendant of the right of trial by jury. All he had to do to obtain it was to file an issuable defense on oath, which he failed to do." See also *Lawrance v. Borm*, 86 Pa. St. 225; *Randall v. Weld*, Id. 357.

But in *State v. Everett*, 14 Minn. 439, a statute which provided that a person convicted upon a criminal prosecution before a justice of the peace should be permitted to appeal to the district court, "provided said person shall within five days enter into a recognizance with one or more sufficient sureties, conditioned to appear before said court and abide the judgment of the court therein, and in the mean time to keep the peace and be of good behavior," was held to be unconstitutional, in so far as it made the entering into the recognizance a condition of securing the right to a trial by jury. Berry, J., who delivered the opinion of the court in that case, said: "In the case at bar, the only trial which was permitted the defendant before the justice was a trial by a jury of six men, and he was, under the statute referred to, permitted to appeal to the district court, and there obtain trial by a jury of twelve men *only*, upon entering with surety into the recognizance spoken of. The effect of this state of facts was, in our opinion, such as to deprive him of his constitutional right of trial by jury;" citing the principal case. Had the statute, however, provided that the defendant might give bail or stand committed, it would not be amenable to objection, since it would in such case be within his power to comply with one or the other alternative, and thereby secure his right to a jury trial: *State v. Everett*, *supra*; *Jones v. Robbins*, 8 Gray, 329. In delivering the opinion in the latter case, Shaw, C. J., said: "This is a necessary inconvenience, as is also the delay of the trial till the sitting of such court." And in the case of *Saco v. Woodsum*, 39 Me. 258, it was held, citing the principal case, that an act requiring an accused person to give a bond in order to enable him to secure a jury trial in an appellate court was unconstitutional and void. In *Weir v. St. Paul, S. & T. F. R. R. Co.*, 18 Minn. 155, it was decided that a statute that required an appellant to file a bond with sureties, and which thereby fettered the right of trial by jury, was nugatory. And in *Neely v. State*, 5 Bax. 174, an act providing that the fees of the jury should be taxed

to the losing party in all civil suits was declared to be unconstitutional and void, as interfering with the right of trial by jury.

"LAW OF THE LAND" MEANS DUE PROCESS OF LAW according to the course and usage of the common law: *Wright v. Wright's Lessee*, 56 Am. Dec. 723; *Brown v. Hummel*, 47 Id. 431, note 440, where other cases are collected; *Jones v. Robbins*, 8 Gray, 345, citing the principal case.

JURY TRIAL, IN WHAT CASES LEGISLATURE MAY DISPENSE WITH: See *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 178, note 185, where this subject is discussed; *Flint River Steamboat Co. v. Foster*, Id. 248, note 269; *McGinnis v. State*, 49 Id. 697; *Neel v. State*, 50 Id. 209.

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AGENCY.

- 1. AGENT ACTING EITHER IN PUBLIC OR PRIVATE CAPACITY IS NOT NECESSARILY MADE LIABLE, although he does not give a cause of action against some one else. *Ogden v. Raymond*, 429.**
- 2. ONE WHO ASSUMES TO CONTRACT IN NAME OF ANOTHER AS HIS PRINCIPAL, with an honest intent, openly and fully disclosing all the facts touching his supposed authority, or which may be fairly implied from his situation, especially if he provides against his personal liability in any event, can not be held liable, unless he be guilty of fraud or false representation. *Id.***
- 3. AGENT CAN NOT BE SUED AS CONTRACTING PARTY IN CONTRACT, unless it contains apt words to charge him as such. *Id.***
- 4. RULE THAT IF AGENT DOES NOT BIND HIS PRINCIPAL he binds himself needs qualification, and is not universally correct. Where an agent personally covenants, and then adds his representative character, which he does not in truth sustain, his covenant remains personal and binds him as an individual; but if the contract does not contain a personal undertaking, he is not personally liable. *Id.***
- 5. WHERE AGENT ACTING IN PUBLIC BUSINESS ENTERS INTO CONTRACT for the benefit of the public, he is presumed to act in his official capacity; but if he is acting in private business, there is no presumption for or against, and he is or is not liable, according to the language used. *Id.***
- 6. AGENTS OF STATE ARE LIABLE IN DAMAGES FOR TRESPASS OR WASTE COMMITTED, in the prosecution of a public work, to individuals whose rights are not concluded by a just compensation awarded for the loss or injury to their property. *Ex parte Martin*, 321.**

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1. SUBMISSION OF SUIT TO ARBITRATORS AT COMMON LAW, and not under the statute nor under a rule of court, is a discontinuance of the pending action. *Moore v. Allen*, 700.
2. ACTION BY ADMINISTRATOR UPON AWARD OF ARBITRATORS made in favor of intestate, after his death, can not be maintained in behalf of the intestate's assignee of the claim, the agreement to submit to arbitration containing no provisions authorizing intestate's assignee, or other representative, to act in his behalf or in his name in the prosecution of this claim before the arbitrators, and the administrator having taken no part in the proceedings. *Id.*

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ATTACHMENTS.

1. ESTATE IN REMAINDER, IN REAL OR PERSONAL ESTATE, is property, and is subject to attachment for the payment of debts. *Lockwood v. Nye*, 73.
2. MONEY IN HANDS OF SHERIFF, collected under execution, is not subject to attachment or garnishment, as a debt due to the plaintiff in execution, but is in the custody of the law until finally and properly disposed of. *Olymer v. Willis*, 414.
3. PAYMENT BY GARNISHEE OF JUDGMENT, rendered against him as such, will protect him against a suit upon the original claim. *Smoot v. Eslava*, 310.
4. WHERE TWO JOINT MAKERS OF NOTE ARE GARNISHED as debtors of the payee, and answer admitting their indebtedness, but fail to disclose the fact that they have been notified of the transfer of the note, a payment of the judgment rendered against them on their answer will not discharge them from liability to the real owner. *Id.*
5. TRANSFEREE OF NOTE WHO HAS BEEN NOTIFIED of payment of the same, and fails to appear and assert his rights, is estopped from setting up any claim against the garnishees. *Id.*
6. RIGHTS OF PARTIES ON GARNISHMENT DEPEND UPON CONDITION OF THINGS AS EXISTING at the time of the service of the original writ on the trustees, and can not be modified or changed by subsequent transactions. *Williams v. A. & K. R. R. Co.*, 742.
7. AMOUNT TO BE PAID ON CONTINGENCY that certain work contracted to be done by the defendant will be well performed can not be garnished in an action against the defendant before the work was performed. *Id.*
8. ON GARNISHMENT OF FUND BY SEVERAL CREDITORS, the fund must be appropriated to satisfy the judgments according to priority of attachments. *Id.*
9. GARNISHMENT OF AMOUNT DUE DEFENDANT FOR WORK IS PREMATURE when made before the work is completed. *Id.*
10. GARNISHEES ARE LIABLE TO PAY INTEREST on the amount in their hands for which they are charged from and after the day on which the demand of payment was made upon them. *Id.*
11. PLAINTIFF'S CONSENTING TO RELEASE SHERIFF FROM ANY LIABILITY resulting from his leaving slaves, when attached, in the possession of one to whom the debtor had hired them, and in whose employment there is a keeper appointed by the sheriff, does not invalidate the seizure, although the sheriff's responsibility be diminished. *Myers v. Myers*, 689.

See BANKRUPTCY AND INSOLVENCY, 5; EQUITY, 6, 8.

ATTORNEY AND CLIENT.

1. DECLARATION AGAINST ATTORNEY FOR NEGLIGENCE NEED ONLY STATE generally that he was retained, without averring specially that any retainer fee was paid. *Burnham v. Hays*, 389.
2. DECLARATION AGAINST ATTORNEY FOR NEGLIGENCE, which alleges that he was retained in consideration of certain fees and rewards to be paid him,

should state the time at which such payment should be made, as in the absence of an agreement to the contrary an attorney is always entitled to his retainer fee in advance. The payment of such fee should be alleged as positively as the performance of any other condition precedent. *Id.*

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1. WHARFINGERS AND WAREHOUSEMEN, UNLIKE COMMON CARRIERS, are responsible for the loss of goods intrusted to their care, only where such loss occurred through the neglect to exercise reasonable and ordinary care and diligence. *Cox v. O'Riley*, 633.
2. IN ACTION AGAINST WHARFINGER FOR VALUE OF GOODS received by him, and which he failed to deliver to the consignee, he must prove the property to have been lost, or to have passed out of his possession, in order to have the court determine whether it had been so lost for the want of reasonable care. *Id.*
3. REQUESTING "A LAD," WHO DOES NOT APPEAR TO BE AGENT OF CONSIGNEE, to notify said consignee that a box was at the wharf for him, or proof that a rumor of such fact had reached said consignee, will not excuse a wharfinger from his neglect to give direct and reasonably prompt notice thereof. *Id.*

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1. COUNSEL SHOULD BE APPOINTED TO MAKE ABSENT CREDITORS PARTIES in cases of voluntary surrender. *Northern Bank v. Squires*, 682.
2. ORDER OF COURT ACCEPTING SURRENDER OF INSOLVENT'S PROPERTY, and staying all proceedings against him, precludes creditors from instituting a suit in another court, when the order is authorized by the laws of this state. *Id.*
3. STATE INSOLVENT OR BANKRUPT LAWS, as to contracts posterior to those laws, are valid and binding between citizens of the state where such laws exist, as to contracts made and to be performed in the state. *Id.*
4. DISCHARGE IN BANKRUPTCY GRANTED UNDER LAWS OF STATE, as between citizens of the state where the discharge is granted, and as to contracts made and to be executed there, is valid and binding everywhere. *Id.*
5. ASSIGNMENT IN BANKRUPTCY IN NEW BRUNSWICK vests all the property of the bankrupt in the assignee; and one who is indebted to the bankrupt, and who is a resident of New Brunswick, but who is temporarily in this

state, can not be charged by a creditor in this state as a trustee, after the assignment made. *Smith v. Eaton*, 746.

6. EVIDENCE THAT FOREIGN BANKRUPTCY WAS FRAUDULENT AND COLLUSIVE IS INADMISSIBLE to impeach a bankrupt's certificate duly obtained from the commissioner and certified by the court of chancery under the statutes of the country. *Id.*

See COVENANTS, 3, 5; EQUITY, 10; FRAUDULENT CONVEYANCES, 2; NEGOTIABLE INSTRUMENTS, 3.

BANKS AND BANKING.

See CORPORATIONS, 1, 2, 12.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF EXCHANGE.

See CONFLICT OF LAWS; NEGOTIABLE INSTRUMENTS.

BONA FIDE PURCHASERS.

See EXECUTIONS, 27, 37; EXECUTORS AND ADMINISTRATORS, 13; NEGOTIABLE INSTRUMENTS, 18, 19, 23.

BONDS.

1. ASSIGNOR OF BOND, EITHER FOR MONEY OR LAND, undertakes, by implication, that he has a right to pass to the assignee what his assignment purports to pass. If the assignor does not possess such right, he is liable for a breach of his implied undertaking the moment the assignment is made. *Emmerson v. Claywell*, 645.

2. ASSIGNEE OF BOND, THOUGH RECEIVING IT WITH KNOWLEDGE THAT ANOTHER PERSON CLAIMED IT, may recover against his assignor, unless by the contract he agreed to risk the claim of such third person. *Id.*

See CONSTITUTIONAL LAW, 14; CORPORATIONS, 2; DEEDS, 14, 15; EXECUTIONS, 1, 4-6, 22; EXECUTORS AND ADMINISTRATORS, 3, 11; GUARDIAN AND WARD; JUDGMENTS, 7, 8; MAINTENANCE; PLEADING AND PRACTICE, 38; SCHOOLS, 1; SURETYSHIP, 6-9, 11; VENDOR AND VENDEE, 1.

BOUNDARIES.

LINE DESCRIBED AS RUNNING "DOWN RIVER" FROM POINT ON BANK must be taken to be a line along the river, and the words do not indicate merely the general direction. *Pike v. Monroe*, 751.

See EQUITY, 3; EVIDENCE, 25, 26; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2.

BURDEN OF PROOF.

See CONTRACTS, 10; DEEDS, 8; EVIDENCE, 2; FRAUD, 2; JURY AND JURORS, 2; MALICIOUS PROSECUTION, 7; MASTER AND SERVANT, 8.

BURGLARY.

See CRIMINAL LAW, 17, 18, 24.

BY-LAWS.

See CORPORATIONS, 19, 20; MASTER AND SERVANT.

CATTLE.

See EXECUTIONS, 7; NEGLIGENCE, 2-4; RAILROADS, 2.

CERTIFICATES.

See BANKRUPTCY AND INSOLVENCY, 6; CORPORATIONS, 5; TRESPASS, 2.

CHALLENGES.

See CRIMINAL LAW, 29. .

CHANCERY.

See EQUITY.

CHARTERS.

See BANKS AND BANKING, 1, 2, 6, 10; RAILROADS, 1.

CLIENT.

See ATTORNEY AND CLIENT.

COLLISIONS.

See EVIDENCE, 27; WILLS, 5, 6.

COLOR OF TITLE.

See EVIDENCE, 6.

COMMISSIONERS.

See CORPORATIONS, 1, 5, 21; PLEADING AND PRACTICE, 4.

COMMISSIONS.

See FACTORS, 3, 4.

COMMON CARRIERS.

See BAILMENTS, 1.

COMMON LAW.

See EXECUTMENT, 2; EXECUTIONS, 30; MANDAMUS, 4; PLEADING AND PRACTICE, 19, 20.

COMMONS.

See DEEDS, 19.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 2.

COMPLAINTS.

See PLEADING AND PRACTICE, 2, 2.

COMPROMISE.

See EXECUTORS AND ADMINISTRATORS, 14.

CONCEALMENT.

See SURETYSHIP, 12, 13.

CONDITIONAL SALE.

See SALES, 1.

CONDITIONS.

See DEEDS, 14, 15; EXECUTORS AND ADMINISTRATORS, 3; MORTGAGES, 2;
NEGOTIABLE INSTRUMENTS, 13.

CONDONATION.

See MARRIAGE AND DIVORCE, 7, 8.

CONFESSIONS.

See CRIMINAL LAW, 37.

CONFLAGRATIONS.

See EMINENT DOMAIN, 5-10.

CONFLICT OF LAWS.

1. STATE, IN ITS SOVEREIGN CAPACITY, CAN EXERCISE FULLEST AUTHORITY OVER ITS OWN TRIBUNALS, and prohibit citizens of other states from suing in them on contracts made, either in or out of the state, unless restricted by some superior power. *Northern Bank v. Squires*, 682.
2. BILL OF EXCHANGE DRAWN BY CITIZEN OF LOUISIANA, upon and accepted by citizens of Louisiana, and payable to the order of a citizen of the same state, will be understood as intended to be made payable in Louisiana, unless the contrary appears. *Id.*
3. WHERE POSSESSION OF PROPERTY IN ONE STATE HAS COMMENCED BY FORCE or fraud, practiced within the limits and jurisdiction of a sister state, and contrary to the authority and judicial process of the same, such property must be returned to the state whence it was taken, and the parties remitted to that jurisdiction for a determination of their rights. *Myers v. Myers*, 689.
4. LAWS REGULATING ACQUISITION OR TRANSMISSION OF TITLE TO PERSONALTY are those which are in force where the owner is domiciled. *Smith v. Eaton*, 746.

See BANKRUPTCY AND INSOLVENCY, 3-6; EXECUTORS AND ADMINISTRATORS, 2; JURISDICTION, 3, 4; PLEADING AND PRACTICE, 16, 17.

CONSIDERATION.

See CONTRACTS, 5, 6; CORPORATIONS, 11; DEDICATION, 1; MAINTENANCE;
STATUTE OF LIMITATIONS, 13.

CONSIGNOR AND CONSIGNEE.

See BAILMENTS, 2; FACTORS; PARTNERSHIP, 4.

CONSOLIDATION.

See PLEADING AND PRACTICE, 19, 20.

CONSTABLES.

See OFFICES AND OFFICERS.

CONSTITUTIONAL LAW.

1. **RETROSPECTIVE LAW IS VALID** which does not impair or defeat vested rights. *Rawls v. Kennedy*, 289.
2. **RETROSPECTIVE LAWS ARE CONSTITUTIONAL** when remedial in their nature, and which do not infringe upon or divest vested rights. *Wynne's Lessee v. Wynne*, 66.
3. **REGISTRY ACTS HAVING RETROSPECTIVE OPERATION** have never been considered as falling within the constitutional inhibition against *ex post facto* laws and laws impairing the obligation of contracts. *Tucker v. Harris*, 488.
4. **LAW EMBRACES BUT ONE SUBJECT** when it authorizes the construction of a railroad and provides that it shall have power to extend to and unite with other roads. *Belleville & Illinoistown R. R. Co. v. Gregory*, 589.
5. **SUBJECT OF BILL IS EXPRESSED IN ITS TITLE** when the subject is to incorporate a railroad company, and the title is "An act to incorporate the Belleville and Illinoistown railroad company;" although the name of the company does not give a full description of the road authorized to be constructed. *Id.*
6. **ACT INCORPORATING RAILROAD COMPANY IS PRIVATE LAW** within the meaning of the Illinois constitution providing that no private law shall be passed which embraces more than one subject, and that shall be expressed in its title. *Id.*
7. **LEGISLATURE BY SIMPLY DECLARING PRIVATE ACT TO BE PUBLIC LAW CAN NOT EVADE EFFECT OF CONSTITUTIONAL PROVISION** declaring that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." *Id.*
8. **LEGISLATURE MAY REGULATE BY LAW SALE OF ANY ARTICLE** the use of which would be detrimental to the morals of the people. *State v. Gurney*, 782.
9. **ACT IMPOSING DOUBLE PENALTY UPON ONE WHO APPEALS**, in case he is convicted by a jury in the appellate court, is unconstitutional. But the appellate court may, after conviction by the jury, impose the single penalty, where such penalty appears to be appropriate, and the law does not state by what tribunal it may be imposed. *Id.*
10. **PHRASE "BY THE LAW OF THE LAND" MEANS BY PROCESS AND PROCEEDINGS** of the common law, by which process and proceedings the accused has the right to know the charge, in the whole form and substance, against him, to contest it, and if not proved to the satisfaction of a jury, to demand an acquittal. *Inhabitants of Saco v. Wentworth*, 786.
11. **EVERY PERSON PROSECUTED FOR CRIME HAS CONSTITUTIONAL GUARANTY OF TRIAL BY JURY**, and no law can be enacted which shall take away this right or interpose such impediments to its exercise as unnecessarily or unreasonably to impair it. *Id.*
12. **ACT WHICH MAKES IT DIFFICULT FOR ACCUSED TO OBTAIN TRIAL BY JURY**, beyond what public necessity requires, impairs individual rights, and is inconsistent with the provision of the constitution which guarantees their protection. *Id.*
13. **ACT REQUIRING CONDITIONS FOR PURPOSE OF PREVENTING TRIAL BY JURY** is at war with the spirit of the constitution, and so far as it deprives one of this means of protection, it is void. *Id.*

14. **STATUTE REQUIRING ACCUSED, AS PREREQUISITE FOR OBTAINING JURY TRIAL**, to give a bond in a large penal sum, conditioned to be void if he shall abstain from all violations of the provisions of the act during the pendency of the appeal taken for the purpose of securing a trial by jury, contravenes the provision of the constitution which guarantees to the accused a speedy trial by jury, and is therefore void; and no action can be maintained on such a bond. *Id.*

See **CORPORATIONS**, 19-21; **EMINENT DOMAIN**; **EVIDENCE**, 4; **JUDGMENTS**, 14; **STATUTE OF LIMITATIONS**, 2; **STATUTES**, 1, 2.

CONSTRUCTION.

See **DEEDS**, 10-14; **EXECUTIONS**, 11, 12; **EXECUTORS AND ADMINISTRATORS**, 2; **GUARANTY**, 1, 2; **PLEADING AND PRACTICE**, 9; **STATUTES**; **USAGE**, 1.

CONSTRUCTIVE NOTICE.

See **MORTGAGES**, 5.

CONTINUANCE.

See **CRIMINAL LAW**, 25, 26; **JUDGMENTS**, 2.

CONTRACTS.

1. **CONTRACTS MADE IN VIOLATION OF STATUTE ARE INVALID.** *Persons v. Jones*, 476.
2. **ONE HAVING CONTRACTED TO HAUL LOGS INTO STREAM FULFILLS HIS CONTRACT** by landing the logs at any point within the stream, whether they could be run from that point or not. *Palmer v. Fogg*, 708.
3. **PARTY WHO RELIES ON FRAUD AS GROUND FOR INVALIDATING CONTRACT** must upon the discovery of the fraud take immediate steps to rescind the contract. If he repeatedly ratifies the acts of which he complains, he will be forever estopped from setting up such a defense. *Southern Life Ins. & T. Co. v. Lanier*, 448.
4. **TWO PARTIES TO CONTRACT CAN NOT BIND OTHER PARTIES TO CONTRACT** by independent agreement in reference to the original contract. *Palmer v. Fogg*, 708.
5. **ACTION UPON PROMISE IS MAINTAINABLE** only when consideration is derived by one party from another party to the suit, negotiable paper excepted. *Machias Hotel Co. v. Coyle*, 712.
6. **PARTY FOR WHOSE BENEFIT CONTRACT WAS MADE MAY MAINTAIN SUIT** thereon in his own name, disregarding the agency or name by which he acted in the formation of the contract, provided the consideration is derived by one party from another party to the suit. *Id.*
7. **ACTION CAN NOT BE MAINTAINED TO RECOVER MONEY EXPENDED** at no request of the defendant, express or implied, nor for any purpose from which he could derive any benefit. *Id.*
8. **IN ORDER TO RECOVER IN ASSUMPSIT FOR PART PERFORMANCE OF DIVISIBLE CONTRACT**, it is not necessary that the contractee should have wrongfully refused to restore to the contractor what he has received under the contract. Such recovery may be had upon contracts for personal services, where it would be impossible to place the parties in statu quo. *Coe v. Smith*, 618.

9. RECOVERY IN ASSUMPSIT FOR PART PERFORMANCE OF EXPRESS CONTRACT must in no case exceed the contract price, or the rate of it for the part of the contract performed. *Id.*
 10. IN ASSUMPSIT UPON QUANTUM MERUIT FOR SERVICES PERFORMED, the question, "What were the services rendered worth?" is correct, as *prima facie* the benefit of the party receiving the services would be measured by their worth; and the burden is upon him to show the contrary. *Id.*
 11. ON ONE PERSON'S ENGAGING TO FURNISH SUPPORT FOR ANOTHER WITHOUT DESIGNATION of any place where it is to be furnished, the support must be provided where the person to be supported elects to receive it without occasioning unnecessary expense. *Norton v. Webb*, 745.
 12. PARTIES HAVE RIGHT TO ADJUST AMOUNT DUE IN MONEY ON CONTRACT PAYABLE IN WOOL, where at the time of payment several installments of wool have been delivered, but a large amount still remains payable; and on such an adjustment neither party can be relieved without error, mistake, or fraud in making it; and in the absence of such evidence, it is error for the court to instruct the jury as to the mode of reckoning to ascertain the amount without regard to the settlement made by the parties. *Bryant v. Crosby*, 767.
- See AGENCY; ASSIGNMENT OF CONTRACTS; BANKRUPTCY AND INSOLVENCY; BONDS; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 3; CORPORATIONS, 7-9, 16; DEEDS; EQUITY, 4, 5; EVIDENCE, 10, 11; EXECUTORS AND ADMINISTRATORS, 9; GAMING; INSURANCE—FIRE, 1; MARRIAGE AND DIVORCE, 1; MASTER AND SERVANT; MORTGAGES; SALES; SHIPPING; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; SUBSCRIPTION; SURETYSHIP; USAGE; VENDOR AND VENDEE.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

See CO-TENANCY, 9; TROVER.

CONVICTIONS.

See CONSTITUTIONAL LAW, 9; CRIMINAL LAW, 16-20, 24.

COPARCENERS.

See STATUTE OF LIMITATIONS, 3.

CORPORATIONS.

1. WHERE CHARTER OF BANKING CORPORATION REQUIRED SUBSCRIBERS TO ITS STOCK to pay at the time of the subscription, to commissioners appointed to open books for that purpose, ten per cent on each share subscribed, directing that as soon as the stock was taken and the ten per cent paid in, trustees should be elected and the company be fully organized; and an amendatory act, passed after the organization of the company, authorized it to allow any stockholder to surrender his certificate of stock and take a certificate of full stock equal to the amount of payment made on his original stock, and empowered the company to reissue the stock surrendered: *Held*, that the company was not bound to require

the purchasers of such surrendered stock to pay the ten per cent on the shares purchased by them; that the requirements of the original charter had exclusive reference to those who subscribed before the company was organized; that the powers of the commissioners ceased as soon as the stock was subscribed and the ten per cent was paid in; and that the company, and not the commissioners, had the power to reissue the surrendered stock. *Southern Life Ins. & T. Co. v. Lanier*, 448.

2. WHERE CHARTER OF BANK AUTHORIZES IT TO REISSUE SURRENDERED STOCK and invest the proceeds in bonds and mortgages, it may sell such stock directly for bonds and mortgages. *Id.*
3. WHERE GRANT OF POWER TO CORPORATION IS CLEARLY DEFINED, and no mode is prescribed for its exercise, the corporation may adopt such mode as in its judgment will secure the purpose contemplated. *Id.*
4. SUBSCRIBER IS PERSONALLY LIABLE FOR ASSESSMENTS ON STOCK OF CORPORATION, where he signs a promise to pay therefor in the subscription book, although the only remedy given by the act of incorporation for a failure to pay assessments is a forfeiture of stock. *Railroad Co. v. Bailey*, 181.
5. CERTIFICATE OF BOARD OF COMMISSIONERS IS CONCLUSIVE upon the validity of subscriptions to the stock of a corporation, the amount thereof, and on the question of legal organization, when the commissioners are appointed under an act of the legislature to find and certify on these facts. *Id.*
6. FORFEITURE OF CHARTER OF CORPORATION CAN NOT BE SET UP BY STOCKHOLDER as a defense to an action against him for assessments on his stock. The forfeiture can be taken advantage of only by the state, and in direct proceedings against the corporation. *Id.*
7. EACH SUBSCRIPTION TO STOCK OF CORPORATION IS INDEPENDENT CONTRACT, and in no way connected with or dependent upon the terms or agreements concerning other subscriptions. *Id.*
8. EVIDENCE OF PRIVATE PAROL AGREEMENTS WITH PREVIOUS SUBSCRIBERS TO CORPORATE STOCK, made at or before signing, and inconsistent with the written terms of subscription, is inadmissible in an action for assessments against a subscriber. *Id.*
9. MUTUALITY OF OBLIGATION EXISTS IN TERMS OF SUBSCRIPTION TO CORPORATE STOCK, although the subscription was subject to the acceptance or rejection of commissioners until the organization of the corporation; it not appearing that the subscription was rejected by the commissioners or disaffirmed by the corporation when it became organized. *Id.*
10. SUBSCRIBER CAN NOT OBJECT TO ALTERATIONS IN CORPORATE CHARTER SUBSEQUENT TO HIS SUBSCRIPTION to the stock, where his assent and requirement thereto is to be inferred, and the alterations were necessary, and permitted the application of the money to the purpose for which it was specifically subscribed. *Id.*
11. CORPORATION FORMED FROM ASSOCIATION OF INDIVIDUALS FOR BUSINESS PURPOSES, without the consent of a subscriber to the association, can not recover on subscriber's subscription for money laid out and expended by itself for the use of the defendant, as there is no consideration between the parties, nor for money expended by the association before the incorporation, as the corporation is not identified with those whose money was expended. *Machias Hotel Co. v. Coyle*, 712.

12. ACTION MAY BE MAINTAINED AGAINST BANK CORPORATION FOR PROSECUTING VEXATIOUS SUIT against an individual who has suffered damage thereby. *Goodspeed v. East Haddam Bank*, 439.
 13. CORPORATIONS ARE, IN MODERN TIMES, BROUGHT TO SAME CIVIL LIABILITIES as natural persons, so far as this can be done practically and consistently with their charters, and are civilly responsible, in their corporate capacities, for all torts which work injury to others. *Id.*
 14. DIRECTORS OF CORPORATION CONSTITUTE CONTROLLING POWER OF CORPORATION, and are not to be regarded merely as its agents or servants acting under a delegated authority; and the doctrine that principals are not responsible for the willful misconduct of their agents can not be applied to them. *Id.*
 15. MALICE OF CORPORATION MAY BE PROVED by proving the motives of its directors, in the same way that the motives of other associated or conspiring bodies are proved. *Id.*
 16. PARTY CAN NOT BE ALLOWED TO AVOID HIS CONTRACT WITH CORPORATION, and thereby diminish a fund designed as a security for the benefit of the public, on the pretense that there was some abuse of the corporate powers or mismanagement on the part of the board of directors in making the contract. *Southern Life Ins. & T. Co. v. Lanier*, 448.
 17. SECURITY TAKEN BY CORPORATION MAY BE ENFORCED against him who gave it, although the transaction may be culpable on the part of the directors of the corporation, and a ground of forfeiture in a question between it and the government which created it. *Id.*
 18. OFFICERS OF INSOLVENT CORPORATION ARE TRUSTEES for its creditors. *Id.*
 19. VIOLATIONS OF ORDINANCE OF MUNICIPAL CORPORATION, not embraced in the elemental definition of crimes as recognized by the penal statutes, are not criminal cases included in the provision of the state constitution that the superior courts shall have exclusive jurisdiction in all criminal cases, except in the cases that are therein specified; and therefore a statute authorizing a municipal corporation to impose a penalty for such violation is constitutional. *Floyd v. Commissioners*, 559.
 20. ENFORCEMENT OF MUNICIPAL BY-LAWS, AND INFLECTION OF FINES thereunder without the intervention of a jury, is not in conflict with the provision of the state constitution securing the trial by jury, "as heretofore used in this state," because such right was not claimed for or accorded to offenders in such cases before the adoption of the state constitution. *Id.*
 21. STATUTE GRANTING TO COMMISSIONERS OF TOWN POWER TO ISSUE LIQUOR LICENSES, under such regulations as they might prescribe, provided that the applicant be required to take the oath required by the general law of the state, gives full and complete authority to the commissioners to prescribe any and whatsoever legal and constitutional regulations they please, subject to which such license should be granted, provided the oath specified was administered; and therefore they are authorized to prescribe as an additional regulation that the clerk of the applicant shall take a similar oath. *Id.*
- See CONSTITUTIONAL LAW, 4-7; MASTER AND SERVANT; NEGLIGENCE; RAILROADS; SUBSCRIPTION.

COSTS.

1. **FOR FILING UNNECESSARILY GROSS AND INDELICATE PETITION FOR DIVORCE**, the court taxed the costs upon plaintiff's attorney: *Held*, that the court had a right to exercise such power in its discretion, and that the appellate court can only interfere in case of an abuse thereof. *Brown v. Brown*, 641.
2. **COURT HAS LEGAL DISCRETION TO ALLOW AMENDMENT OF COST BILL** and the affidavit accompanying it, under the sixty-eighth section of the practice act, and party can not say that this discretion has been abused when it resulted in the reduction of the amount of the costs as to him. *Burnham v. Hays*, 389.
3. **TIME WITHIN WHICH TO FILE COST BILL IS NOT ENLARGED**, after the expiration of that time, by granting leave to amend a bill duly filed, as the amendment relates back to the time of filing the original of which it is a part. *Id.*
4. **IF ORIGINAL AFFIDAVIT TO COST BILL BE NULLITY**, defendant should treat it as such, and take the proper steps to set it aside; but by moving to retax, he brings it before the court of his own motion, and it is proper for the court to grant leave to amend said bill, or to make such other order as in its discretion it deems necessary. *Id.*
5. **AFFIDAVIT TO BILL OF COSTS** can be made by the attorney of the prevailing party, under the statute. *Id.*

See EXECUTIONS, 20.

CO-TENANCY.

1. **GRANTOR BECOMES TENANT IN COMMON** with one to whom he has conveyed "one half of my lot." *Lick v. O'Donnell*, 393.
2. **ONE TENANT IN COMMON CAN NOT MAINTAIN ACTION FOR FORCIBLE ENTRY** and unlawful detainer against his co-tenant; but in order to obtain relief, must resort to a court of equity for a partition of the land in dispute. *Id.*
3. **POSSESSION OF ONE TENANT IN COMMON** is the possession of all, unless there be an actual ouster. *Young v. Adams*, 654.
4. **ONE OF SEVERAL TENANTS IN COMMON ENTERING UPON LAND** necessarily acquires possession of the whole, unless he expressly limit his possession to a part. His possession in law is not adverse to his co-tenant, unless he imparts to it that character by claiming the whole of the land as his own, or denies his co-tenant right to any part of the same. *Id.*
5. **HUSBAND'S ENTRY UPON LAND IN RIGHT OF WIFE**, in which the latter has title to an undivided interest with others, will inure to the benefit of the other part owners, unless their interest is disputed and he claim the whole as belonging to his wife. *Id.*
6. **TENANT IN COMMON** who obtained a conveyance from his co-tenant for the purpose of mortgaging the entire estate, and bound himself to reconvey one half of the land after the mortgage is raised, but who rents out the premises and collects the rents, becomes, as to these rents and profits, a trustee by implication for his co-tenant. *Tarleton v. Goldthwaite's Heirs*, 296.
7. **TENANT IN COMMON RECEIVING RENTS** under an implied trust for his co-tenant is chargeable with interest on the amount found in his hands from the time of its receipt. *Id.*

8. **TENANT IN COMMON MAY MAINTAIN SEPARATE DISTRESS OR ACTION FOR SHARE OF RENT** of the common lands, as a general rule; and where rent is collected by an administrator or guardian in his own wrong, each of several co-heirs entitled thereto may waive the tort and sue in *assumpsit* for his share. *Smith's Ex'rs v. Wiley*, 262.

9. **TENANT IN COMMON MAY SUE ALONE FOR CONVERSION** of the common property, or if it has been converted into money may waive the tort and sue in *assumpsit* for his share. *Id.*

See **GUARDIAN AND WARD; PARTITION; SHIPPING, 5, 8; STATUTE OF LIMITATIONS, 3.**

COURTS.

See **JUDGMENTS, 2, 3, 5, 10, 11; JURISDICTION; PLEADING AND PRACTICE; PROBATE COURTS.**

COVENANTS.

1. **COVENANT AGAINST INCUMBRANCES IS BROKEN AT TIME OF CONVEYANCE** by existence of outstanding mortgage on the premises. *Reed v. Pierce*, 761.

2. **DAMAGES ON BREACH OF COVENANT AGAINST INCUMBRANCES BY OUTSTANDING MORTGAGE** is the sum paid, if the mortgage is discharged by the covenantee; but if the incumbrance is not removed, and there is no action on the part of the mortgagee to enforce his mortgage, damages are nominal. *Id.*

3. **ACTION FOR BREACH OF COVENANT AGAINST INCUMBRANCES IS BARRED** by the subsequent discharge in bankruptcy of the covenantor. *Id.*

4. **SEVERAL COVENANTS IN DEED OF WARRANTY ARE DISTINCT**; their breach arises at different times, is established by proof of different facts, and damages therefor may be enforced by different suits, and recompensed by different rules of damages; and whatever may be a discharge of one is not necessarily that of another and distinct covenant. *Id.*

5. **DISCHARGE IN BANKRUPTCY IS NO DEFENSE TO ACTION FOR BREACH OF COVENANT** of warranty when, at the time of the discharge, there was no breach of the covenant, and whether there would be any such breach was uncertain. *Id.*

See **AGENCY, 4.**

CREDITOR'S BILL.

See **EQUITY, 9-13.**

CRIMINAL LAW.

1. **FROM APPELLANT SEEKING TRIAL BY JURY NOTHING MORE THAN REASONABLE SECURITY** for his appearance can be rightfully required in a criminal prosecution. *State v. Gurney*, 782.

2. **INDICTMENT FOR RECEIVING USURIOUS INTEREST** upon a note must state the place of the execution of said note. *State v. Williams*, 627.

3. **RULE REQUIRES THAT WHEN COUNTY IS CLEARLY EXPRESSED** in the body of an indictment, where any positive fact is averred, it should be stated to have been done "then and there," and this should be repeated to every material fact which is issuable and triable. *Id.*

4. INDICTMENT SHOULD ALLEGE EVERY MATERIAL FACT that serves to constitute the offense charged, with precision and certainty as to time and place. *State v. Thurstin*, 695.
5. GENERAL AVERMENT IN INDICTMENT THAT ACCUSED HAD COMMITTED PARTICULAR CRIME NAMED, without more specific allegations, would be insufficient. *Id.*
6. INDICTMENT HAVING ONCE STATED TIME WITH CERTAINTY MAY REFER TO It, in respect to other facts alleged, by the terms "then" and "there," without repeating it. *Id.*
7. IN CRIMINAL PLEADING NOTHING CAN BE TAKEN BY INTENDMENT. *Id.*
8. INDICTMENT CHARGING ADULTERY WITH CERTAIN NAMED WOMAN, but averring no time to the fact that she was a married woman, and not referring it to certain time before stated by the words "then" and "there," or any equivalent terms, is insufficient. *Id.*
9. ALLEGATION IN INDICTMENT, "BEING A MARRIED WOMAN AND THE LAWFUL WIFE OF A.," has reference to the time of finding the indictment, and not to the time of the offense in strictness of criminal law. *Id.*
10. INDICTMENT FOR ADULTERY IS INSUFFICIENT AS NOT ALLEGING WOMAN TO BE MARRIED at the time of the alleged committal of the offense, if it charges that the defendant, on the twenty-fifth of March, 1851, committed adultery with B., she, the said B., "being a married woman and the lawful wife" of A. *Id.*
11. INDICTMENT CHARGING TWO OR MORE CRIMES IN ONE COUNT is bad for duplicity. *Ben v. State*, 234.
12. INDICTMENT CHARGING ADMINISTERING POISON AND CAUSING IT TO BE ADMINISTERED TO THREE PERSONS, in the same count, is not bad for duplicity. *Id.*
13. INDICTMENT CHARGING STATUTORY OFFENSE NOT IN STATUTORY WORDS BUT EQUIVALENT WORDS is good. *Id.*
14. INDICTMENT FOR "ATTEMPT TO POISON," UNDER STATUTE CHARGING ADMINISTERING POISON to persons named, willfully and maliciously, and with intent to kill and murder, is good, though not adopting the words of the statute. *Id.*
15. THAT RECORD DOES NOT SHOW PRISONER WAS FURNISHED WITH COPY OF INDICTMENT and a list of the jury before trial, as required, is not available on error, if no objection appears to have been made at the trial. *Id.*
16. DEMURRER TO PLEA OF AUTREFOIS CONVICT ADMITS FACTS ALLEGED THEREIN, but denies their legal sufficiency to procure defendant's acquittal. *Roberts v. State*, 528.
17. DEMURRER IN INDICTMENT FOR ROBBERY TO PLEA OF FORMER CONVICTION OF BURGLARY does not admit that the charge in each indictment was the same, when the plea alleges that the felony in which conviction was had was the same felony of which the defendant stood accused, but admits only that the two indictments related to the same transaction. *Id.*
18. DEMURRER IN INDICTMENT FOR ROBBERY TO PLEA OF FORMER CONVICTION OF BURGLARY, by admitting that the two indictments related to the same transaction, becomes in the appellate court an effectual admission that the evidence of violent stealing relied upon on the trial for burglary to prove felonious intent was the same with that offered upon the trial for robbery, though the record does not show this. *Id.*

19. **PLEA OF FORMER ACQUITTAL OR CONVICTION IS SUFFICIENT** only whenever the proof shows the second case to be the same transaction with the first. *Id.*
20. **PLEA OF AUTREFOIS CONVICT IS SPECIAL PLEA IN BAR** of the prosecution pending; and in order to plead the same with effect, the crime must be the same for which the defendant was previously convicted upon a sufficient indictment. *State v. Foster*, 678.
21. **PROCLAMATION OF GOVERNOR OFFERING REWARD** for the apprehension of a criminal is admissible as evidence to sustain an allegation in indictment charging that the accused had fled from justice. *Id.*
22. **IN CASES OF HOMICIDE**, where the mortal stroke was given in Louisiana but the death occurred in Mississippi, the crime may be prosecuted in the parish where the mortal stroke was given. *Id.*
23. **MORTAL WOUND INFLICTED ON BOARD OF VESSEL** in lake Borgne, which was moored to a wharf in the parish of St. Bernard: *held*, that the courts of the parish named had jurisdiction over the offender. *Id.*
24. **PLEA OF FORMER CONVICTION OF BURGLARY IS SUFFICIENT** in an indictment for robbery based on the same offense, when the record shows that in order to show felonious intent in the former the circumstances of the stealing were proved, and thus the same transaction, the robbery, was involved in both cases. *Roberts v. State*, 528.
25. **PARTY MOVING CONTINUANCE OF CRIMINAL CAUSE ON GROUND OF HIS INABILITY TO SUBPENA WITNESS**, by reason of recent finding of bill, and his close confinement since his arrest, must show that he has certain witnesses, giving their names, and must state what he expects to prove by them, in order that the court may determine whether or not the testimony would be material. *Id.*
26. **MOTION FOR CONTINUANCE OF CRIMINAL CAUSE ON ACCOUNT OF POPULAR EXCITEMENT** against the prisoner is within the discretion of the judge to overrule, on the ground that five months had elapsed from the alleged time of the committal of the offense, which, in his opinion, was sufficient time for the subsidence of any popular excitement arising out of the circumstances of the case; and no reason appearing to induce doubt that he has exercised his discretion wisely, his decision will be sustained in the appellate court. *Id.*
27. **COURT MAY CHARGE JURY THAT THEY MAY FIND VERDICT OF GUILTY ON FIRST COUNT** of an indictment, inasmuch as the second is defective. *Id.*
28. **IT IS FOR JURY TO SAY WHETHER EVIDENCE** that defendant on a single occasion sold liquor in less quantities than a gallon, and suffered it to be drunk in his house, and that he had bottles of different kinds of liquor usual in retail establishments, is sufficient to sustain a prosecution under section 17, act of March, 1853; and their finding will not be disturbed. *Bepley v. State*, 628.
29. **DEFENDANTS INDICTED FOR AFFRAY ARE TO BE TRIED TOGETHER**, and for the purposes of the trial and in making their defense are to be considered as having one common interest; consequently each defendant will not be allowed seven peremptory challenges, and if one of the defendants has introduced evidence in his behalf the state has a right to conclude the argument to the jury, although the other defendant has introduced no evidence. *Hawkins v. State*, 517.

30. **SUCCESSFUL DEFENSE OF ONE WILL OPERATE AS ACQUITTAL OF BOTH DEFENDANTS** where the two are indicted for an affray. *Id.*
 31. **WORDS ALONE OF PARTIES WILL NOT CONSTITUTE AFFRAY**; but their words accompanied by their acts respectively in drawing their knives and attempting to use them will make them guilty of an affray. *Id.*
 32. **ONE WHO AIDS, ASSISTS, AND ABETS AFFRAY IS GUILTY as principal**. *Id.*
 33. **MERE CIVIL TRESPASS UPON MAN'S HOUSE**, unaccompanied by such force as to make it a breach of the peace, is not a sufficient provocation to reduce the killing of the trespasser to manslaughter, if committed under circumstances from which the law would imply malice. *Carroll v. State*, 282.
 34. **WHERE TRESPASS IS FORCIBLE, OWNER MAY RESIST ENTRY**, but he is not justified in killing the trespasser, unless it is necessary to prevent a felonious destruction of his property, or to defend himself against loss of life or great bodily harm. *Id.*
 35. **WHERE PARTY KILLS HIS ASSAILANT** when there is not reasonable ground for apprehending imminent danger to his person or property, it is manslaughter; if the killing is accompanied with malice, express or implied, it is murder. *Id.*
 36. **EVIDENCE OF THREATS OF VIOLENCE** made by the deceased against the prisoner is not admissible unless the same was communicated to the prisoner previous to the killing. *Id.*
 37. **VOLUNTARY CONFESSION OF ACCUSED** respecting the act he committed, together with the manner in which the same was rendered, is admissible in evidence. *Id.*
 38. **EVIDENCE THAT DECEASED WAS "TURBULENT AND QUARRLSOME MAN,"** ON TRIAL FOR MURDER, is inadmissible by way of justification or excuse, although the deceased had threatened the prisoner's life, where it is shown that the prisoner sought him out and shot him, without any attempt on his part to execute his threats. *Pritchett v. State*, 250.
 39. **PRIOR THREATS AND DESPERATE CHARACTER OF DECEASED, IN CASE OF MURDER**, are competent evidence in connection with evidence of his conduct at the time of the killing, where there are circumstances tending to show that the killing was in self-defense, but they do not justify seeking him out and killing him. *Id.*
 40. **EVIDENCE OF ONE WITNESS IS NOT SUFFICIENT TO CONVICT OF PERJURY**, as the case is then in equilibrium, oath weighing against oath. *Newell v. Statuck*, 706.
- See CONSTITUTIONAL LAW**, 9-14; **CORPORATIONS**, 19, 20; **JURISDICTION**, 5; **JURY AND JURORS**; **PLEADING AND PRACTICE**, 38.

CROPS.

See INJUNCTIONS, 7; **PUBLIC LANDS**.

CROSS-EXAMINATION.

See WITNESSES, 6.

CRUELTY.

See MARRIAGE AND DIVORCE.

DAMAGES.

See AGENCY, 6; CORPORATIONS, 12; COVENANTS, 2, 4; EMINENT DOMAIN; EXECUTIONS, 30; FIDUCIARIES, 4; INJUNCTIONS, 4, 5; NEGLIGENCE; SALES, 15; SLANDER, 1; STATUTE OF LIMITATIONS, 1; TROVER.

DAMS.

See WATERCOURSES, 7.

DEATH.

See ARBITRATION AND AWARD, 2; EQUITY, 9; EVIDENCE, 2.

DEBT.

See GUARDIAN AND WARD.

DECEIT.

See STATUTE OF LIMITATIONS, 4.

DECLARATIONS.

See ATTORNEY AND CLIENT; EVIDENCE, 20-22, 24, 26; PLEADING AND PRACTICE, 14; WILLS, 10.

DECREEES.

See JUDGMENTS

DEDICATION.

1. PUBLIC IS EVER-EXISTING GRANTEE, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them. *Warren v. Jacksonville*, 610.
2. MODE OF MAKING DEDICATIONS TO PUBLIC IS IMMATERIAL: the intention of the party, manifested by express consent or acquiescence in the user, will govern in determining whether it be a dedication. *Id.*
3. PRIVIES IN ESTATE ARE BOUND TO SAME EXTENT AS GRANTORS, by deeds and acts under them; and it is not within the power of either to resume a grant to the public after the public have entered upon the use designed nor while it is so used. *Id.*

DEEDS.

1. INSTRUMENT INCAPABLE OF HAVING ANY OPERATION, AND BEING NO DEED at time of its execution, can not afterwards become a deed by being completed and delivered in the absence of the party who executed it, by a stranger unauthorized by an instrument under seal. *Ingram v. Little*, 549.
2. DEED TO "ONE HALF OF MY LOT" MAY NOT BE VOID FOR UNCERTAINTY, if it can be established by parol that the grantor owned but one lot at the time of its execution. *Lick v. O'Donnell*, 383.
3. HABENDUM CAN NOT BE USED TO CONVERT RELEASE OR QUITCLAIM DEED INTO CONVEYANCE OF FEE SIMPLE ABSOLUTE, when the grantor has no such interest to convey, and in fact no interest at all. *Frink v. Darst*, 575.
4. UNRECORDED AND UNACKNOWLEDGED DEED passes the title as between the parties. *Floyd v. Ricks*, 374.
5. DEED TAKES EFFECT FROM ITS DELIVERY. *Id.*

6. DEED WITHOUT SEAL CAN NOT OPERATE TO PASS LEGAL TITLE; but such deed, if sufficiently proved, should be admitted on behalf of defendant in trespass, and is competent to show at least that the grantee had lawful license to enter upon the premises therein attempted to be conveyed. *Id.*
7. DEED CAN NOT BE DELIVERED AND ACCEPTED PARTIALLY, for the purpose of conveying title to the grantee, and yet so as not to give effect to its conditions, recitals, and limitations. *Warren v. Jacksonville*, 610.
8. PRESUMPTION OF DELIVERY AND ACCEPTANCE OF DEEDS DULY ACKNOWLEDGED AND RECORDED WILL BE INDULGED IN, and that parties and privies, as well as the public, are acquainted with their contents. Whoever questions any of these facts must assume the burden of proving them. *Id.*
9. PURCHASER AT ADMINISTRATOR'S SALE WHO HAS HIS DEED FIRST RECORDED will gain the same preference over an unrecorded deed as if he had bought directly from the debtor himself. *Tucker v. Harris*, 488.
10. IN CONSTRUING DEED, EFFECT MUST BE GIVEN TO INTENTION of parties, if practicable, when no principle of law is thereby violated. *Pike v. Monroe*, 751.
11. WHATEVER IS EXPRESSLY GRANTED, COVENANTED, OR PROMISED CAN NOT BE RESTRICTED or diminished by subsequent provisions or restrictions. *Id.*
12. IF DEED MAY OPERATE IN TWO WAYS, one of which is consistent with the intent of the parties, and the other repugnant thereto, it will be so construed as to give effect to the intention indicated by the whole instrument. *Id.*
13. DOUBTFUL WORDS AND PROVISIONS ARE TO BE CONSTRUED MOST STRONGLY AGAINST GRANTOR. *Id.*
14. WHERE FATHER EXECUTES DEED OF FARM TO HIS SON, UPON CONSIDERATION of one dollar and of the son's executing a bond to him covenanting to cultivate said farm in a husband-like manner and to deliver to his father one third of the yearly produce of said farm, the deed and bond are to be treated as together constituting a single instrument, and are but parts of one contract. *Leach v. Leach*, 642.
15. WHERE CONSIDERATION OF DEED WAS ONE DOLLAR, and the execution of an agreement by the grantee to pay to the grantor, during his life, one third of the crop raised on the demised premises, the performance of this latter agreement is a condition subsequent, and the failure to so pay the one third yearly produce is such a breach as will work a forfeiture of the estate, and equity will interfere to set aside the conveyance. *Id.*
16. UPON SETTING ASIDE CONVEYANCE, COURT SHOULD TAKE ACCOUNT. The defendant should be allowed for the money consideration paid by him, together with interest, for rents paid, and improvements made, and should be charged with the rent for the whole farm from the time he went into possession. *Id.*
17. RESERVATION CAN NOT BE REGARDED AS REPUGNANT AND VOID when the grantee, if it be permitted to be effectual, may acquire a valuable interest in the thing granted. *Gay v. Walker*, 734.
18. OWNER CONVEYING LAND MAY RESERVE FREE FLOW OF LIGHT AND AIR over it without obstruction; and such reservation is good as something not in the sense of the law before existing, but derived from the thing granted. *Id.*

19. **STIPULATION IN GRANT THAT LAND IS TO BE "COMMON AND UNOCCUPIED"** is valid where the grantee owns adjoining land which would be materially benefited if the land granted remained open; and in such a case the grantor may maintain an action against a lessee of the grantee for erecting a building on the land. *Id.*
 20. **RESERVATION TO BE GOOD MUST BE MADE TO GRANTOR;** it is not the less made to him if it be so made that others can derive advantage from it. it will be considered as made to him when valuable rights are secured to him, although others may be benefited by it. *Id.*
 21. **DISSEISER HAVING RIGHT OF ENTRY MAY CONVEY TITLE** as freely as if there had been no disseisin. *Pratt v. Pierce*, 758.
 22. **SUBSEQUENTLY ACQUIRED TITLE BY RELEASOR WILL NOT VEST IN RELEASEE** by a deed by which the grantor does "grant, sell, and convey" unto the grantee all his "right and interest in and unto" certain described lands, "to have and to hold the same to the said grantee, his heirs and assigns forever," if the releasor had no interest in the lands at the time of the execution of the deed. *Frink v. Darst*, 575.
 23. **RELEASE OR SIMPLE QUITCLAIM DEED IS INEFFECTUAL TO VEST SUBSEQUENTLY ACQUIRED TITLE** by the releasor in the releasee, when made by one having no interest at the time, containing no covenants express or implied, and professing to convey only such interest as the releasor had. *Id.*
 24. **DEED MUST PURPORT TO CONVEY ESTATE IN FEE SIMPLE ABSOLUTE**, or a perfect or indefeasible title, and be not a quitclaim deed, or a deed merely professing to convey the grantor's right and interest, in order that it may be affected by section 7, Illinois revised statutes of 1833, p. 131, and a subsequently acquired title may inure thereunder to the benefit of the grantee. *Id.*
- See** BOUNDARIES; CO-TENANCY, 1; COVENANTS; DEDICATION; DOWER; EQUITY, 5; EVIDENCE, 6; EXECUTIONS, 30, 36; MAINTENANCE; MARRIED WOMEN, MORTGAGES, 1, 2; STATUTE OF FRAUDS, 2; STATUTE OF LIMITATIONS, 5; TAXATION, 1; VENDOR AND VENDEE; WATERCOURSES, 10.

DE FACTO OFFICERS.

See MANDAMUS, 1, 5; OFFICES AND OFFICERS.

DEFAULT.

See PLEADING AND PRACTICE, 30; VENDOR AND VENDEE.

DEFINITIONS.

See CONSTITUTIONAL LAW, 10; EMINENT DOMAIN, 3; EXECUTIONS, 11; EXECUTORS AND ADMINISTRATORS, 8.

DELIVERY.

See DEEDS; SALES, 3; STATUTE OF FRAUDS.

DELIVERY BONDS.

See EXECUTIONS, 1, 4-6, 22; JUDGMENTS, 7, 8; SURETYSHIP, 8.

DEMAND.

See GUARANTY; NEGOTIABLE INSTRUMENTS.

MURDER.

See CRIMINAL LAW, 16-18; PLEADING AND PRACTICE, 10, 11, 12, 14.

DEPOSITIONS.

See EVIDENCE, 7-9.

DEPUTIES.

See EXECUTIONS, 34, 35; SHERIFFS; SURETYSHIP, 5, 10.

DESCRIPTION.

See BOUNDARIES; EXECUTIONS, 31, 32, 38; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 4; INSURANCE—FIRE, 1; LANDLORD AND TENANT, 1; SALES, 2.

DETAINER.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

DETINUE.

See EXECUTORS AND ADMINISTRATORS, 8.

DEVIATION.

See INSURANCE—MARINE, 3.

DEVICES.

See MARRIED WOMEN, 5; WILLS, 1.

DIRECTORS.

See CORPORATIONS, 14, 15, 17.

DISCLAIMER.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2, 3; LANDLORD AND TENANT, 3-5, 7.

DISMISSAL.

See NEGOTIABLE INSTRUMENTS, 26.

DISSEISIN.

See DEEDS, 21; LANDLORD AND TENANT, 8; MAINTENANCE.

DISSOLUTION.

See MARRIAGE AND DIVORCE; PARTNERSHIP.

DISTRESS.

See CO-TENANCY, 8.

DISTRICT COURTS.

See JUDGMENTS, 10, 11; PLEADING AND PRACTICE, 36.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

See CONFLICT OF LAWS, 4.

DOWER.

WHERE GRANTEE OF LAND EXECUTES MORTGAGE THEREOF AT TIME HE TAKES HIS DEED, to secure the payment of the purchase money, he has but an instantaneous seisin, which does not entitle his wife to dower; and she has no different rights in case the mortgage is made to a third person, who pays the consideration in pursuance of a previous agreement between the parties. *Smith v. Stanley*, 771.

See MORTGAGES, 18.

DUPLICITY.

See CRIMINAL LAW, 11, 12.

EASEMENTS.

INFERENCE ESTABLISHING RIGHT OF WAY IN PUBLIC OVER UNINCLOSED LAND CAN NOT BE DEDUCED from the mere travel across it by the public without objection from the owner. *Warren v. Jacksonville*, 610.

See DEEDS, 18; RAILROADS, 3, 4.

ECCLESIASTICAL LAW.

See MARRIAGE AND DIVORCE, 9.

EJECTMENT.

1. PROOF OF TITLE IS GENERALLY UNNECESSARY WHERE PRIVITY OF ESTATE has existed between the parties to an action to recover realty. *Emerich v. Tavenner*, 217.
2. PLAINTIFF IN EJECTMENT MAY RECOVER TO EXTENT OF UNDIVIDED INTEREST shown in the lessor at the date of the demise. *Young v. Adams*, 654.
3. GENERAL ISSUE ONLY CAN BE PLEADED IN EJECTMENT, under the Illinois R. S., p. 206, sec. 17; but the same matter may be given in evidence thereunder as in the common-law action of ejectment, except proofs of some fictitious matters which are abolished. *Warren v. Jacksonville*, 610.

See EXECUTIONS, 26, 36; LANDLORD AND TENANT, 2; PLEADING AND PRACTICE, 18, 46; TRUSTS AND TRUSTEES, 1, 2; VENDOR AND VENDEE, 2, 6, 8.

ELECTION.

See CONTRACTS, 11; FACTORS, 3; LANDLORD AND TENANT, 8; SALES, 9; VENDOR AND VENDEE, 5; WILLS, 7, 8.

ELECTIONS.

See SCHOOLS, 3.

EMINENT DOMAIN.

1. PRIVATE PROPERTY CAN NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION, though no such provision be contained in the state constitution; for this prohibition upon the legislature is implied from the nature and structure of the government, even if it were not embraced by necessary implication in other provisions of the bill of rights. *Ex parte Martin*, 321.
2. RIGHT OF EMINENT DOMAIN IS INHERENT IN SOVEREIGN POWER, and equally so is the vested right to his property in the citizen. *Id.*

3. **RIGHT OF EMINENT DOMAIN MEANS THAT WHEN PUBLIC NECESSITY or common good requires it the citizen may be forced to sell his property for its fair value.** *Id.*
4. **ARTICLES OF STATE CONSTITUTION GUARANTEEING TO CITIZENS the right of acquiring, possessing, and protecting property necessarily imply the prohibition upon the legislature from taking private property for public use without providing for just compensation to be first made to the owner.** *Id.*
5. **AUTHORITIES OF CITY WHO CAUSE TO BE BLOWN UP OR DESTROYED any building therein situated, for the purpose of preventing the spread of a conflagration, are not liable in damages to the owner thereof.** *Savocco v. Geary*, 385.
6. **BUILDINGS ON FIRE OR THOSE TO WHICH FLAMES ARE ABOUT TO BE COMMUNICATED are nuisances, which it is lawful to abate. The private rights of the owners in such case must yield to the public convenience and the interests of society.** *Id.*
7. **DESTRUCTION OF BUILDING TO PREVENT SPREAD OF CONFLAGRATION is not "a taking of private property for public use," within the meaning of the constitution requiring compensation to be made in such cases.** *Id.*
8. **NECESSITY OF TEARING DOWN BUILDING TO PREVENT SPREAD OF CONFLAGRATION must be judged of by the party so doing, regulated by the exigencies of the case, and must be clearly shown. If the building is torn down without actual or apparent necessity, the party would be liable in an action of trespass.** *Id.*
9. **PROOF THAT HOUSE WOULD HAVE BEEN CONSUMED HAD IT BEEN LEFT STANDING is sufficient to establish the necessity of tearing it down to prevent the spread of a conflagration.** *Id.*
10. **PARTY CAN NOT RECOVER FOR VALUE OF GOODS WHICH HE MIGHT HAVE SAVED from a building destroyed to prevent the spread of a fire. The goods are as much subject to the necessities of the occasion as the building in which they are situate.** *Id.*

See AGENCY, 6.

ENROLLMENT.

See SHIPPING, 3.

ENTRY.

See CO-TENANCY, 3, 4; FORCIBLE ENTRY AND UNLAWFUL DETAINER; HUSBAND AND WIFE, 1; MORTGAGES, 11.

EQUITY.

1. **WHERE PARTY CAN FIND IN COURT OF LAW FULL AND ADEQUATE REMEDY, a court of equity does not open its door to him.** *Doggett v. Hart*, 464.
2. **COURT OF EQUITY DOES NOT ENTERTAIN JURISDICTION FOR PURPOSE OF PREVENTING MULTIPLICITY OF SUITS merely because the complainant has a multitude of suits depending upon the same question. This species of jurisdiction is consequential rather than original, and is exercised chiefly in regard to matters springing out of subjects belonging appropriately to the jurisdiction of a court of equity.** *Id.*

3. COURT OF EQUITY WILL NOT ENTERTAIN JURISDICTION IN CASES OF CONFUSION OF BOUNDARIES, simply because the boundaries are in controversy, unless there is some equity superinduced by the acts of the parties, such as fraud, gross negligence, omission, or misconduct. *Id.*
 4. BILL OF SALE ABSOLUTE IN FORM, EQUITY WILL GRANT RELIEF AGAINST, on the ground of fraud and mistake, when it appears that it was given as security for an usurious contract, and there is testimony of declarations of the usurer that he had only a lien on the property, and that the debtor might keep it if the principal and interest were paid; although it may be admitted that mere usury will not taint a bill of sale with fraud. *Greer v. Caldwell*, 553.
 5. GEORGIA STATUTE OF DECEMBER 25, 1837, was not intended to deprive courts of chancery of their authority to reform written contracts on the ground of mistake; but the object of the statute was to make plainly illegal the too common practice of allowing parol testimony to prove that a deed, absolute in its terms, was really intended as a mortgage, and this without pretense of fraud or mistake. *Id.*
 6. IF CREDITOR OF PLAINTIFF IN EXECUTION WAS OTHERWISE REMEDILESS, equity might decree a sequestration of money in the hands of the sheriff, collected under such execution. *Clymer v. Willis*, 414.
 7. JUDGMENT AT LAW NOT RELIEVED AGAINST IN CHANCERY ON GROUND OF NEGLECT to attend the court, through forgetfulness of the action, or the day and time of holding court. *Warner v. Conant*, 178.
 8. JUDGMENT AGAINST TRUSTEE IN TRUSTEE PROCESS IS AS CONCLUSIVE AGAINST HIM as a judgment in a common-law action; and the principles which forbid a court of chancery to relieve in one case must equally forbid such relief in the other. *Id.*
 9. WHERE ORIGINAL DEBTOR IS DEAD.—The law is well settled in Indiana that a judgment, even at law, need not be obtained before going into chancery for the collection of the debt. The ground of this jurisdiction stated. *Unknown Heirs v. Kimball*, 638.
 10. WHERE CHANCERY HAS JURISDICTION, independent of all circumstances, and in the first instance for the collection of a debt, the question of solvency or insolvency could have no influence with the court in the determination of the cause. *Id.*
 11. WHERE BILL IS FILED BY ONE CREDITOR, or a few in behalf of all, all are allowed to come in under the decree, prove their claims, and have them paid in the course of administration. *Id.*
 12. BILL FILED TO SUBJECT EQUITABLE ESTATE OF DECEASED DEBTOR to the payment of a judgment should make the executor or administrator of said deceased a party, or if none had been appointed, it should so allege. *Id.*
 13. BILL FILED AGAINST UNKNOWN HEIRS should contain an affidavit that such heirs are unknown, as required by statute. *Id.*
- See CO-TENANCY, 2; DEEDS, 15; EXECUTIONS, 30, 37; INJUNCTIONS; JUDGMENTS, 6; MARRIAGE AND DIVORCE; MASTER AND SERVANT, 3; MORTGAGES, 7-10; NEGOTIABLE INSTRUMENTS, 19; PLEADING AND PRACTICE, 16; PROCESS, 1; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS, 7-12; TRUSTS AND TRUSTEES.

EQUITABLE CONVERSION.

See WILLS, 6-8.

EQUITY OF REDEMPTION.

See MORTGAGES, 7-10.

ERROR.

See ASSIGNMENT OF CONTRACTS; CONTRACTS, 12; CRIMINAL LAW, 15; EX-
ECUTIONS, 8; NEW TRIAL; PLEADING AND PRACTICE.

ESTATES OF DECEDENTS.

1. ALLEGATION THAT CLAIM AGAINST ESTATE, DULY AUTHENTICATED, WAS PRESENTED to the administrator for allowance and was by him rejected, is sufficient. There is no necessity to aver specially the making of the affidavit required by the statute. The affidavit constitutes no part of the cause of action. *Dean v. Duffield*, 108.
2. ESTATE OF DECEDENT IN TEXAS VESTS IMMEDIATELY IN HEIRS. A qualified interest is subsequently vested in executors and administrators principally for the collection and payment of credits and debts, and at the completion of the trust the property remaining is to be restored to the heirs as the rightful proprietors. *Fisk v. Norvel*, 128.
3. HEIRS AFTER SUCCESSION HAS ONCE BEEN ADMINISTERED AND CLOSED have full ownership of decedent's property, with all the incidental rights of control, disposition, and actions for its recovery and possession. *Id.*
4. PROBATE COURT CAN NOT REOPEN SUCCESSION which has once been administered and closed. *Id.*
5. PROBATE COURT CAN NOT GRANT ADMINISTRATION PRO TEM. OR PENDENTE LITE after the succession has once been administered and closed. *Id.*
6. GRANT BY PROBATE COURT OF ADMINISTRATION PRO TEM. OR PENDENTE LITE after succession has been closed is without its jurisdiction, void, and collaterally attackable. *Id.*

See EXECUTORS AND ADMINISTRATORS; PARTITION; PROBATE COURTS; SURETYSHIP, 3.

ESTOPPEL

1. TENANT IS ESTOPPED TO IMPUGN LANDLORD'S TITLE during the tenancy, or until he has restored possession, or done something equivalent thereto, either by proof of title in himself or another, whether the question arises in a direct action to recover possession or in a collateral action. *Emerick v. Tavener*, 217.
2. TENANT HOLDING OVER AFTER EXPIRATION OF LEASE IS ESTOPPED to deny his lessor's title. So a tenant acquiring possession by wrong. *Id.*
3. ACCEPTANCE OF LEASE BY ONE IN POSSESSION ESTOPS him to dispute the lessor's title as effectually as if he had entered under it. *Id.*
4. TENANT'S ESTOPPEL TO DENY LESSOR'S TITLE ATTACHES TO ALL SUCCESSORS who acquire possession through or under such tenant, either immediately or remotely. So where one acquires possession under an absolute conveyance in fee from the tenant. *Id.*
5. TENANT IS ESTOPPED TO DENY BOUNDARIES of the demised premises as described in the lease, or that his possession is within them, in an action for unlawful detainer, where he has executed the lease acknowledging such description and possession. *Id.*
6. TENANT CAN NO MORE DENY POSSESSION under which he enters to be his lessor's than he can controvert his title. *Id.*

7. GRANTER OF VENDOR IS NOT ESTOPPED BY ACCEPTING TRUST DEED OF PREMISES FROM VENDEE in possession as security for a debt due another, from recovering the premises in ejectment, against the vendee, upon the latter's failure to comply with his contract of purchase. *Seabury v. Stewart*, 254.
 8. VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT IS ESTOPPED TO IMPUGN TITLE of the vendor, or to set up an outstanding title in ejectment against him after his failure to pay. *Id.*
 9. ONE KNOWINGLY AND DESIGNEDLY INDUCING ANOTHER TO PURCHASE ESTATE for a valuable consideration of a third person can not set up a prior and better title in himself to defeat the title of the purchaser. *Stevens v. McNamara*, 740.
 10. ONE WHO INDUCES ANOTHER TO REDEEM PROPERTY SOLD ON EXECUTION against himself, and to take a deed for the same, is estopped to set up a prior and better title to the land. *Id.*
 11. IN CHANCERY CASES, WHERE DECREE IS VOLUNTARILY EXECUTED by the parties, and the plaintiff receives the money decreed to him, he is not estopped from prosecuting an appeal by reason of such receipt. *Tarleton v. Goldthwaite's Heirs*, 296.
- See ATTACHMENTS, 5; CONTRACTS, 3; DEEDS, 22-24; EXECUTIONS, 24; MORTGAGES, 10, 13; STATUTE OF LIMITATIONS, 14; VENDOR AND VENDEE, 8.

EVIDENCE.

1. COURT WILL TAKE JUDICIAL NOTICE that in the general course of agriculture and the seasons of the year a crop will not be ready to harvest by the tenth of August. *Floyd v. Ricks*, 374.
2. CONTINUANCE OF LIFE TO COMMON AGE IS PRESUMED, and the burden of proof lies upon the party alleging the death; but after an absence from his home or place of residence seven years, without intelligence respecting him, the presumption of life will cease, and it is incumbent on the party asserting it to prove that the person was living within that time. *Stevens v. McNamara*, 740.
3. PRINTED STATUTE BOOK IS NOT CONCLUSIVE EVIDENCE OF ACTS CONTAINED THEREIN, but may be corrected by the original acts on file in the office of the secretary of state. *Per Treat, C. J. Spangler v. Jacoby*, 571.
4. JOURNALS OF EITHER BRANCH OF LEGISLATURE MAY BE APPEALED TO to show that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether. *Id.*
5. SIGNATURES OF SPEAKERS AND EXECUTIVE TO ACT ARE PRESUMPTIVE BUT NOT CONCLUSIVE EVIDENCE of the passage of a law; and this presumption may be overcome by the journals. *Id.*
6. DEED DULY EXECUTED, EXCEPT THAT NAME OF GRANTEE AND CONSIDERATION ARE NOT STATED, is inadmissible as a muniment of title, but is admissible to show color of title in the party claiming under it. *Ingram v. Little*, 549.
7. STATEMENT IN CAPTION OF DEPOSITION THAT DEPONENT WAS FIRST SWORN is sufficient evidence that the deponent was sworn before the deposition was given. *Palmer v. Fogg*, 708.
8. DEPOSITIONS PURPORTING TO HAVE BEEN TAKEN ON NOTICE TO ADVERSE PARTY, before a commissioner appointed to take depositions in another

- state, need not, under the Maine statute, be shown by evidence *afande* to have been taken and certified by a person legally empowered. *Id.*
9. DEPOSITIONS MADE RETURNABLE TO TERM OF COURT SUBSEQUENTLY ABOLISHED, by a statute that transferred its business to a subsequent specified term, may be properly filed and opened at the subsequent specified term. *Id.*
 10. CONVERSATIONS OF PARTIES TO CONTRACT CONCERNING ITS PROVISIONS are not admissible in evidence after the contract has been reduced to writing. *Id.*
 11. INDEPENDENT AGREEMENT BETWEEN TWO OF SEVERAL PARTIES TO CONTRACT is admissible upon a question whether there has been a modification of the original contract as tending to show that such a modification did not appear unreasonable to the parties to the independent agreement. *Id.*
 12. PROMISSORY NOTES ARE NOT ADMISSIBLE IN EVIDENCE when no fact appears showing a connection between them and the transaction sought to be proved. *Greer v. Caldwell*, 553.
 13. EVIDENCE OF AMOUNT PAID FOR HIRE OF NEGRO is admissible, if it tend to throw light upon an alleged usurious transaction, by showing that the principal and interest of the original debt had been paid by the hire. *Id.*
 14. MEMORANDA FROM BOOKS AND WRITTEN DOCUMENTS when produced in response to a call in the bill, are evidence in the cause, but are not necessarily conclusive evidence of the facts which they tend to establish. *Tarleton v. Goldthwaite's Heirs*, 296.
 15. EVIDENCE IS NOT ADMISSIBLE AS PART OF RES GESTÆ, as a general rule, unless it grows out of the principal transaction, illustrates its character, and is contemporaneous with it. *Batton v. Watson*, 504.
 16. PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT PARTIES WHO SIGNED SPECIALTY as principals were in fact sureties only. *Burke v. Cruger*, 102.
 17. PAROL EVIDENCE IS ADMISSIBLE TO SHOW NOTE PRODUCED IN EVIDENCE to be the one secured by a mortgage, when it corresponds in some but not in all respects with that described in the condition in the mortgage. *Williams v. Hilton*, 729.
 18. NOTE PAYABLE TO A. MAY BE SHOWN BY PAROL to be one of the notes described in a mortgage as given to A. and B., its date and amount corresponding with the description in the mortgage. *Id.*
 19. PAROL TESTIMONY IS NOT ADMISSIBLE TO EXPLAIN OR QUALIFY WRITING which is expressed in precise terms and free from ambiguity. *Sheldon v. Hartford Fire Ins. Co.*, 420.
 20. DECLARATIONS ACCOMPANYING ACT INADMISSIBLE IN EVIDENCE ARE INADMISSIBLE as part of the *res gestæ*. *Gilbert v. Gilbert*, 268.
 21. DECLARATIONS OF COMPETENT WITNESS are inadmissible except when part of the *res gestæ*. *Id.*
 22. DECLARATIONS OF PARTY IN POSSESSION OF LAND, and proved to be tenant, are not admissible against landlord without bringing home to the latter notice of them. With such notice they might go to show a repudiation of his tenancy, and a setting up of adverse possession and claim. *Ingram v. Little*, 549.

23. PAROL EVIDENCE IS ADMISSIBLE TO SHOW CONSIDERATION HAS NOT BEEN PAID as the contract purports it to have been, where the contract is not under seal. *Bryant v. Crosby*, 767.
 24. ADMISSIONS OF THIRD PERSON ARE ADMISSIBLE IN EVIDENCE against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact. The party is bound, in such cases, by the declarations of the person referred to, in the same manner and to the same extent as if they were made by himself. *Chapman v. Twitchell*, 773.
 25. TRADITIONARY EVIDENCE IS INADMISSIBLE TO PROVE BOUNDARY OF PRIVATE ESTATE, when not identical with one of a public nature. *Id.*
 26. DIAGRAMS OR DECLARATIONS OF DECEASED PERSON CAN NOT BE ADMITTED IN EVIDENCE for the purpose of proving the limits or boundaries of lots, between individuals, where he was never the owner or possessor of the lots. *Id.*
 27. STATEMENT OF WITNESS that soon after a collision he heard some one on board of the colliding vessel say in a commanding tone, "Go ahead, and let her sink; it's nothing but a damned flat boat, anyhow," and the vessel went on without rendering any assistance, is admissible in evidence for plaintiff in action against owners of colliding vessel. *Otis v. Thom*, 303.
- See BANKRUPTCY AND INSOLVENCY, 6; CORPORATIONS, 8; CRIMINAL LAW, 21, 28, 36-40; DEEDS, 2, 6; EJECTMENT, 1, 3; EQUITY, 5; EXECUTIONS, 26, 27, 30; EXECUTORS AND ADMINISTRATORS, 11; FACTORS, 2; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2, 3; FRAUD; JURY AND JURORS, 5; LANDLORD AND TENANT, 3; MALICIOUS PROSECUTION; MARRIAGE AND DIVORCE, 4, 5; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS, 3, 15; NEW TRIAL; PLEADING AND PRACTICE, 22-24, 26-28, 34, 35, 42, 47; SCHOOLS, 2; SLANDER, 2, 3; TRESPASS, 3; WILLS, 10-14; WITNESSES, 4, 5.

EXCEPTIONS.

See PLEADING AND PRACTICE, 27, 28.

EXECUTIONS.

1. VENDITIONI EXPONAS ISSUED ON ORIGINAL JUDGMENT AFTER JUDGMENT ON DELIVERY BOND is nugatory. *Wright v. Yell*, 336.
2. SHERIFF MUST TAKE ACTUAL POSSESSION OF PERSONAL PROPERTY in order to constitute a valid levy thereon, and the act of taking possession must be of such a character as would make the officer, if not protected by the process, liable for the trespass. *Portis v. Parker*, 95.
3. ACT OF SHERIFF IN ASSERTION OF HIS RIGHT TO PERSONAL PROPERTY, levied on by him, must be open and notorious, and such as would be susceptible of proof if called in question. *Id.*
4. WHERE SHERIFF'S RETURN STATES THAT HE LEVIED ON PROPERTY of a certain man, and that a married woman bearing the same surname claimed it as her separate property, and gave bond to try her right, it will be presumed that she was the wife of the defendant in execution. *Id.*
5. EXECUTION OF DELIVERY BOND BY WIFE OF EXECUTION DEBTOR will estop him from denying that there was a levy, or that it was of such a character as would have deprived himself and wife of the possession had the

- bond not been given, where the husband and wife are living together at the time of the making of the levy. *Id.*
6. TAKING OF DELIVERY BOND PRECLUDES SHERIFF FROM CONTESTING the fact of seizure, when sued for a trespass to the property. *Id.*
 7. WHAT CONSTITUTES VALID LEVY OF WILD CATTLE, *quære.* *Id.*
 8. WHERE EXECUTION COMMENCED "THE STATE OF TEXAS, COUNTY OF AUSTIN," and the process had performed its functions, the execution will not be quashed for defect or error in the style of it, although had objection been made *in limine* it might have been quashed or amended. *Id.*
 9. NAKED LEGAL TITLE, HELD IN TRUST, CAN NOT BE SOLD ON EXECUTION at law. *Baker v. Copenbarger*, 600.
 10. EXECUTION CAN NOT BE LEVIED UPON HOPE OR PROBABILITY that money may become due and payable to the defendant in execution upon the happening of some future event. *Id.*
 11. STATUTE EXEMPTING PROPERTY FROM EXECUTION SHOULD BE LIBERALLY construed. *Favers v. Glass*, 272.
 12. "CART" ORDINARILY MEANS TWO-WHEELED VEHICLE, but in a statute exempting debtor's property from execution, the word will be construed to include a four-wheeled vehicle. *Id.*
 13. JUDGMENT DEBTOR IS NOT DIVESTED OF TITLE to real estate by levy of an execution thereon. *Keaton v. Thomasson's Lessee*, 55.
 14. LEVY ON PART OF DEFENDANT'S LANDS DOES NOT POSTPONE JUDGMENT LIEN upon other lands to a junior mortgage thereon. *Trapnall v. Richardson*, 338.
 15. SUBSISTING LEVY ON LAND IS NO BAR TO SCIRE FACIAS on judgment to continue its lien or to substitute a representative of either party. *Id.*
 16. LEVY ON PERSONAL PROPERTY IS SATISFACTION OF JUDGMENT while property remains in legal custody, but not when the property is restored to the debtor or in any manner gets back to his possession, or where the levy, being exhausted by sale, fails to produce satisfaction. *Id.*
 17. LEVY EXHAUSTED BY SALE IS SATISFACTION PRO TANTO, and execution will issue for the residue, if any remain. *Id.*
 18. LEVY OF EXECUTION DURING CONTINUANCE OF JUDGMENT LIEN WILL NOT CONTINUE LIEN beyond the statutory period, and a sale under a *venditioni exponas* issued after the expiration of the judgment lien, without any *scire facias* having been issued to keep it alive, is invalid against a junior mortgage. *Id.*
 19. LEVY ON LAND IS NOT SATISFACTION OF JUDGMENT, and judgment lien continues unbroken. *Id.*
 20. JUDGMENT CREDITOR MAY NOT ABANDON VALID SUBSISTING LEVY ON LAND against the will of the debtor and tax him with the costs of further execution; and on the latter's application, the duty of the court whence the *alias* process is so irregularly issued is to quash or recall it. *Id.*
 21. PLAINTIFF MUST EXHAUST PREVIOUS LEVY BY SALE before he can resort to other property of the defendant. *Id.*
 22. SURETY ON DELIVERY BOND HAS NO RIGHT TO COMPLAIN that judgment creditor ordered the return of a *venditioni exponas* issued on the original judgment after judgment rendered on the delivery bond, for his liability as surety was neither increased nor diminished thereby. *Wright v. Yell*, 336.

23. NOTICE OF MOTION TO QUASH LEVY AND RETURN OF EXECUTION must be given to the purchaser at the sale, and to the plaintiff in execution. *McKinney v. Jones*, 83.
24. DEFENDANT IN EXECUTION HAVING STATED, IN MOTION TO QUASH SHERIFF'S RETURN, the fact of the sale and the name of the purchaser, is estopped from contending that no notice of the motion to the purchaser was necessary, on the ground that the return of the sale not having been signed by the sheriff the court could not know that there was a purchaser to be affected by the judgment. *Id.*
25. DEFENDANT IN EXECUTION MOVING TO SET ASIDE SHERIFF'S RETURN, on the ground that the money had been tendered and refused, must show that such a state of facts existed, in order to be entitled to relief. *Minter v. Branch Bank*, 315.
26. PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT RETURN OF SHERIFF, which is to be considered and treated as part of the record; consequently, in ejectment brought by purchaser under execution the defendant in execution can not show that the sale was made upon another day than that therein mentioned. *Newton v. State Bank*, 363.
27. PURCHASER AT SHERIFF'S SALE, WHO HAS NO AGENCY IN CAUSING IRREGULARITIES therein, but in good faith acquires a legal title valid and regular upon the face of his deed, should have his title protected. Between such purchaser and the parties to the record it would be wrong to suffer them, in a collateral proceeding, to introduce parol evidence to contradict the record evidence of the purchaser's title. *Id.*
28. SALE MADE ON RETURN DAY of the writ of execution is valid. *Id.*
29. MERE IRREGULARITY IN EXECUTION SALE does not avoid it. *Id.*
30. IF SHERIFF ABUSES HIS AUTHORITY TO PREJUDICE OF DEFENDANT IN EXECUTION, he is responsible in damages; or if the purchaser and sheriff combine to commit a fraud upon the defendant, he may apply to a court competent to afford relief; but in a common-law court the validity of a sheriff's deed can not be questioned by parol evidence touching irregularities not affecting the officer's power or authority. *Id.*
31. SHERIFF ADVERTISING PROPERTY, to be disposed of under execution sale, must give a full and complete description of the property to be sold, making known the name of the defendant and the person who may be in possession of the property as shall best enable the public to understand what property is to be sold. *Collier v. Vason*, 481.
32. WHAT CONSTITUTES FULL AND COMPLETE DESCRIPTION OF PROPERTY advertised at sheriff's sale is a question for the jury. *Id.*
33. SHERIFF AFTER EXPIRATION OF TERM HAS AUTHORITY TO SELL GOODS LEVIED upon during his term, and may be compelled to do so. *Tyree v. Wilson*, 213.
34. EXECUTION SALE TO DEPUTY SHERIFF AT UNDERVALUE, after the deputy has forbidden the sale at the instance of the defendant, will be set aside on the application of the execution plaintiff if seasonably made, though such deputy did not make the sale. *Daniel v. McAnnell*, 260.
35. SEVERAL YEARS' DELAY OF MOTION TO SET ASIDE EXECUTION SALE by the plaintiff in execution, because the sale was made to a deputy of the sheriff at an undervalue after the deputy had forbidden the sale at the instance of the defendant, will bar relief, where the plaintiff had sufficient knowledge of the facts to put him on inquiry. *Id.*

36. PURCHASER OF REAL ESTATE AT EXECUTION SALE is immediately entitled to a deed, and having obtained the same, he may resort to ejectment to obtain possession. *Keaton v. Thomasson's Lessee*, 55.
37. EXECUTION SALE UNDER VOID JUDGMENT CONFERS NO TITLE upon the plaintiff in execution who purchases under it, but has not gone into possession; but *quære* as to the equities had he purchased under a fair sale, and gone into possession, or had a third person been the purchaser. *Horan v. Wahrenberger*, 145.
38. SHERIFF IS LIABLE FOR FAILING TO LEVY MORTGAGE FI. FA. upon the mortgaged property, although it belongs to a third person, and is in his possession adversely to the mortgagor, and the mortgage lien is superseded in consequence of a failure to record it, where the process commands him to levy upon and sell the property, designating it by full description. *Wallace v. Holly*, 518.
- See ATTACHMENTS, 2; EQUITY, 6; JUDGMENTS, 6; MARRIED WOMEN, 2; PLEADING AND PRACTICE, 42; PROCESS; SALES, 8; STATUTE OF LIMITATIONS, 5; SURETYSHIP, 5.

EXECUTORS AND ADMINISTRATORS.

1. GRANT OF LIMITED ADMINISTRATION described as administration "*pro tem.*" in the statute is not rendered void by its being designated "*pendente lite*" in the grant, the statutory administration being for substantially the same purposes, and with like powers and limitations; still the statutory designation should be used by the court from which the letters issue. *Fisk v. Norvel*, 128.
2. ADMINISTRATOR OR GUARDIAN CAN NOT RECEIVE RENTS OF LANDS OUTSIDE STATE in which he is appointed, nor can the probate court authorize him to receive them; and if he does receive them, he does so in his own wrong, and is bound to pay the money to those entitled to it. *Smith's Ex'rs v. Wiley*, 262.
3. COURT WILL PRESUME THAT ADMINISTRATOR'S BOND WAS GIVEN IN OPEN COURT, and that the applicant was duly qualified, where the order recites that he "be and he is hereby appointed," etc., and his official bond is produced and corresponds in date, amount, and every other particular with the order; the construction of such an order is that his appointment is absolute and not conditional. *Tucker v. Harris*, 488.
4. AUTHORITY OF ONE OF SEVERAL JOINT EXECUTORS OR ADMINISTRATORS IS ENTIRE with respect to the delivery, gift, sale, or release of the testator's goods. *Shaw v. Berry*, 702.
5. ONE OF SEVERAL JOINT EXECUTORS OR ADMINISTRATORS MAY RELEASE DEBT due the estate. *Id.*
6. POWER OF ADMINISTRATOR IS EQUAL TO AND WITH POWER OF EXECUTOR after administration is granted. *Id.*
7. JOINT ADMINISTRATORS ARE REGARDED IN LAW AS ONE PERSON, and therefore a suit may be maintained on a claim duly presented to and rejected by one only of several administrators. *Dean v. Duffield*, 108.
8. WHERE COURT ORDERED SALE OF ALL PERISHABLE PROPERTY of an estate, and the administrator sold all the personal property, including a number of negroes, and made his return, which was duly recorded, and the administrator *de bonis non* afterwards brought detinue for one of the negroes sold: *held*, that in the absence of a statutory definition of the

term "perishable property," the sale passed the legal title to the slaves. *Steele v. Wyatt*, 317.

9. ADMINISTRATOR OF DECEASED ATTORNEY who in his life-time agreed to defend a certain suit for five hundred dollars, but who died before completing said defense, may recover from the defendant as much as such services are worth. In such a case the action is not upon the contract, but upon the implied promise. *Coe v. Smith*, 618.
 10. ORDER OF PROBATE COURT IS BINDING AND CONCLUSIVE UPON ADMINISTRATOR, in adjudging that he pay over money in his hands to the heir, when the administrator was a direct party to the order, and was before the court at the time. *Ralston v. Wood*, 604.
 11. SUIT IS COLLATERAL ACTION WHEN BROUGHT UPON ADMINISTRATOR'S BOND for failure of the administrator to comply with a judgment of the probate court to pay over moneys to a person entitled thereto; and is founded as well upon the judgment as upon the bond itself; and when the judgment is offered in evidence, it can not be inquired into by those affected by it, except for fraud. *Id.*
 12. SALE OF PERSONALTY OF TESTATOR BY EXECUTOR *de son tort* is unlawful whether it be public or private, and conveys to the purchaser no title. *Woolfork's Adm'r v. Sullivan*, 305.
 13. BONA FIDE PURCHASER FOR VALUABLE CONSIDERATION at a public sale made by an executor *de son tort* acquires a right of possession in personalty which he may maintain and defend against every one but the proper legal representatives of the testator; and if an actual possession has been acquired against him also, he can not be lawfully deprived thereof against his will except by suit. *Id.*
 14. EXECUTOR OR ADMINISTRATOR HAS POWER IN ALABAMA TO COMPROMISE actions pending in favor of, or rights of action belonging to, the testator or intestate, if done *bona fide*. *Id.*
- See ARBITRATION AND AWARD, 2; CO-TENANCY, 8; DEEDS, 9; EQUITY, 11, 12; ESTATES OF DECEDENTS; EXECUTIONS, 15; PROBATE COURTS; SURETYSHIP, 3, 4, 6, 7; VENDOR AND VENDEE, 7; WITNESSES, 2.

EXECUTORS DE SON TORT.

See EXECUTORS AND ADMINISTRATORS, 12, 13.

EXEMPTIONS.

See EXECUTIONS, 11, 12.

EXHIBITS.

See PLEADING AND PRACTICE, 43.

EX POST FACTO.

See CONSTITUTIONAL LAW, 3.

FACTORS.

1. CREDIT SALE BY CONSIGNEE OF GOODS, with power to sell, but without authority to sell on credit, will be considered with regard to the rights of the consignor as having been for cash, and the consignee is liable to the consignor as for money had and received. *Johnson v. Totten*, 412.

2. **OWNER OF GOODS MAY MAINTAIN ACTION AGAINST TORTIOUS POSSESSORS THEREOF** as consignees or factors, and it is competent for him to introduce evidence showing the manner in which they became possessed of the goods, even though such proof should establish such possession to have been wrongful. He may waive the tort. *Lubert v. Chauviteau*, 415.
3. **OWNER OF GOODS WHO ELECTS TO PROCEED AGAINST TORTIOUS POSSESSORS THEREOF**, as consignees or factors, thereby ratifies the act of his agent in delivering said goods to them, and they must be considered as the authorized consignees and commission merchants of said owner, and entitled to the rights and benefits arising from this relation, such as commissions and an allowance for disbursements. *Id.*
4. **IN ACTION BY OWNER OF GOODS AGAINST TORTIOUS POSSESSORS THEREOF**, as consignees or brokers, the measure of damages is the net proceeds of the sales of said goods. In such action the defendants need not set up in their answer their claim to commissions and disbursements, either as new matter or by way of set-off, in order to have them allowed. *Id.*
5. **PLEDGE IS PROPER PARTY TO CALL FACTOR TO ACCOUNT**, where he receives the goods with the understanding that he should dispose of them through a factor, and credit the debtor with the amount of sales, and he accordingly commits them to a factor, from whom he takes a receipt. *Bigelow v. Walker*, 156.
6. **FACTOR IS TO SELL FOR FAIR VALUE OR MARKET PRICE** in the absence of special directions, and if he sells or falsely accounts at an underprice, he is liable to make additional compensation for the property. *Id.*
7. **AMOUNT DUE FROM FACTOR IS IN NATURE OF FUND PROVIDED FOR PLEDGEE'S BENEFIT** by the pledgor, and which the pledgee is not at liberty to wholly disregard, and claim the entire balance of his debt as if no means of satisfaction had ever been at his command, where he has the superior right to pursue the fund by virtue of an understanding that the goods received by him should be disposed of through a factor, and the debtor credited with the amount of sales. *Id.*

See **NEGOTIABLE INSTRUMENTS**, 16, 17.

FALSE REPRESENTATIONS.

See **AGENCY**, 2; **MARRIED WOMEN**, 3; **SALES**, 2, 7, 14; **SURETYSHIP**, 12.

FEDERAL COURTS.

See **JUDGMENTS**, 5.

FEEES.

See **ATTORNEY AND CLIENT**.

FEE SIMPLE.

See **DEEDS**, 3, 24; **LANDLORD AND TENANT**, 2, 4, 7, 8.

FEMES COVERT.

See **MARRIED WOMEN**.

FEMES SOLE.

See **MARRIED WOMEN**, 8.

FENCES.

See NEGLIGENCE, 2-4; RAILROADS, 2, 3.

FINDINGS.

See CRIMINAL LAW, 28.

FINES.

See CORPORATIONS, 20; JURISDICTION, 5.

FIRE INSURANCE.

See INSURANCE—FIRE.

FIRES.

See EMINENT DOMAIN, 5-10.

FLATS.

See WATERCOURSES, 8-11.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. TENANT AND PURCHASER UNDER HIM MAY BE JOINED IN ACTION FOR UNLAWFUL DETAINER by the lessor, though they do not occupy the premises jointly, but each severally occupies a part. *Emerick v. Tavenor*, 217.
2. LESSOR MAY INTRODUCE LEASE WITHOUT PROVING LOCALITY OR BOUNDARIES of the demised premises, in an action for unlawful detainer against his tenant holding over and disclaiming to hold under him. *Id.*
3. PROOF IN ACTION FOR UNLAWFUL DETAINER OF DEFENDANT'S POSSESSION of some part of the premises is unnecessary against a tenant of the plaintiff holding over and disclaiming to hold under him, but *aliter* as to a purchaser under such tenant. *Id.*
4. PLAINTIFF IN ACTION FOR UNLAWFUL DETAINER MAY RECOVER ACCORDING TO DESCRIPTION of the premises in his warrant or in the lease under which the defendant received possession from him, and must, at his peril, point out the premises to the sheriff, being compelled to make restitution if he takes more than he has recovered. *Id.*

See CO-TENANCY, 2; LANDLORD AND TENANT, 2-5.

FORECLOSURE.

See MORTGAGES, 7-10.

FOREIGN BANKRUPT LAWS.

See BANKRUPTCY AND INSOLVENCY, 5, 6.

FORFEITURE.

See CORPORATIONS, 4, 6, 17; DEEDS, 15; GAMING; MASTER AND SERVANT; MORTGAGES, 16.

FORMER CONVICTION.

See CRIMINAL LAW, 16-20, 24.

FORTHCOMING BONDS.

See EXECUTIONS, 1, 4-6, 22; JUDGMENTS, 7, 8; SURETYSHIP, 3.

FRAUD.

1. FRAUD OR MISTAKE MUST BE ESTABLISHED BY EVIDENCE SO CLEAR AND STRONG as to produce satisfactory conviction; slight suspicions, vague presumptions, bare possibilities, will not do; yet the evidence need not be positive. *Greer v. Caldwell*, 553.
 2. BURDEN OF PROVING FRAUD IS UPON PARTY CHARGING IT. *Bartlett v. Blake*, 775.
- See AGENCY, 2; BANKRUPTCY AND INSOLVENCY, 6; CONFLICT OF LAWS, 3; CONTRACTS, 3, 12; EQUITY, 4, 5; EXECUTIONS, 30; EXECUTORS AND ADMINISTRATORS, 11; FRAUDULENT CONVEYANCES; MARRIAGE AND DIVORCE, 2, 3; MARRIED WOMEN, 3; SALES, 2, 7, 14; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS, 4; SURETYSHIP, 12, 13; WILLS, 9-15.

FRAUDULENT CONVEYANCES.

1. RETENTION OF POSSESSION OF PERSONAL PROPERTY AFTER SALE by vendor raises a rebuttable presumption of fraud, but is not fraud in itself. *Shaddon v. Knott*, 63.
2. INSOLVENCY OF VENDOR AT TIME OF SALE OF UNFINISHED CHATTEL, and his treating it after the sale as if it were his own, do not furnish conclusive proof that the sale was fraudulent, although they would be strong indications of fraud if unexplained. *Bartlett v. Blake*, 775.

GAMING.

CONTRACT TO FORFEIT CERTAIN AMOUNT IN CASE OF FAILURE TO RUN HORSE-RACE is a valid contract, and an action may be maintained upon a note given for such amount. *Kirkland v. Randon*, 94.

GARNISHMENT.

See ATTACHMENTS.

GENERAL ISSUE.

See EJECTMENT, 3; MALICIOUS PROSECUTION, 6, 7; TRESPASS, 2.

GROWING CROPS.

See INJUNCTIONS, 7; PUBLIC LANDS.

GUARANTY.

1. LETTER OF CREDIT IN FOLLOWING TERMS: "J. B. M. being about to commence retailing dry goods, I hereby undertake and contract with L. & Co. to become responsible to them for the amount of any bill or bills of merchandise sold by them to said M., agreeably to the terms of sale agreed upon by the parties, without requiring said L. & Co. to prosecute suit against said M. therefor," construed to be a continuing guaranty not limited to the first bill of goods bought. *Lowe v. Beckwith*, 659.
2. LETTER OF CREDIT MUST BE CONSTRUED BY ITS OWN TERMS, but the general rule seems to be that they should be liberally construed. *Id.*
3. NOTICE OF EACH SUCCESSIVE SALE OR ADVANCE made under a continuing guaranty is unnecessary. *Id.*
4. NOTICE AND DEMAND MUST BE MADE OF GUARANTOR within a reasonable time after the goods are furnished on a continuing guaranty, in order to entitle the creditor to a recovery. *Id.*

5. EXECUTION OF WRITTEN GUARANTY CAN BE PUT IN ISSUE only by an appropriate plea. *Donley v. Camp*, 274.
See NEGOTIABLE INSTRUMENTS, 1-4, 17; STATUTE OF FRAUDS, 3.

GUARDIAN AND WARD.

- WARD MAY SET OFF IN DEBT ON REFUNDING BOND TO GUARDIAN SHARE OF RENT received by such guardian on lands without the state belonging to the ward and others as co-tenants. *Smith's Executors v. Wiley*, 282.
See CO-TENANCY, 8; EXECUTORS AND ADMINISTRATORS, 2.

HEIRS.

- See EQUITY, 13; ESTATES OF DECEDENTS, 2, 3.

HABENDUM.

- See DEEDS, 3.

HIGHWAYS.

- See NEGLIGENCE, 4.

HIRE.

- See EVIDENCE, 13.

HOMICIDE.

- See CRIMINAL LAW, 22, 33-39.

HORSE-RACING.

- See GAMING.

HUSBAND AND WIFE.

1. HUSBAND'S ENTRY UPON LAND IN RIGHT OF HIS WIFE can not afterwards prejudice her right by buying a title adverse to that right. *Young v. Adams*, 654.
2. PRIVATE PROPERTY OF EACH PARTNER IN MATRIMONIAL UNION must, as a general rule, bear its own charges and expenses. *Womack, Administrator, v. Womack*, 119.
3. PROPERTY PURCHASED DURING MARRIAGE IS PRESUMED TO BELONG TO COMMUNITY, whether the conveyance be made to the husband or wife separately, or to them jointly. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife; in which case, it remains the separate property of the party whose money was employed in the acquisition. *Huston v. Curl*, 110.
4. NOTE PAYABLE TO WIFE IS ALSO PAYABLE TO HUSBAND, and can only be transferred by his act; but where she is authorized to take notes as a *feme sole*, title will pass by her indorsement. *Krebs v. O'Grady*, 312.
See CO-TENANCY, 5; MARRIAGE AND DIVORCE; MARRIED WOMEN.

ILLEGAL CONTRACTS.

- See CONTRACTS, 1; GAMING.

IMPEACHMENT OF WITNESSES.

See WITNESSES, 6, 7.

IMPLIED CONTRACTS.

See BONDS; EXECUTORS AND ADMINISTRATORS, 9; SHIPPING, 2.

IMPLIED TRUSTS.

See CO-TENANCY, 6, 7; TRUSTS AND TRUSTEES, 4.

IMPROVEMENT.

See MORTGAGES, 10; PUBLIC LANDS; VENDOR AND VENDEE, 4.

INCUMBRANCES.

See COVENANTS; MORTGAGES, 4.

INDEPENDENT CONTRACTS.

See CORPORATIONS, 7.

INDEX.

See MORTGAGES, 4.

INDICTMENT.

See CRIMINAL LAW.

INDORSEMENT.

See HUSBAND AND WIFE, 4; NEGOTIABLE INSTRUMENTS.

INJUNCTIONS.

1. **INHERENT JURISDICTION OF EQUITY TO GRANT INJUNCTION OR ABATE NUISANCES** should be exercised with caution. *Ex parte Martin*, 321.
2. **INJUNCTION TO STOP UNDERTAKING OF PUBLIC NATURE** or of private nature, if in the latter great expense has been incurred, will not be granted without a reasonable notice to the defendants, and then the chancellor may well hear affidavits in support or denial of the bills. *Id.*
3. **NO NOTICE TO DEFENDANTS OF APPLICATION FOR SPECIAL INJUNCTION** OUGHT TO BE REQUIRED in cases where the injury may be immediate and destructive, and thus irreparable, or where the giving of the notice might precipitate the act sought to be enjoined. *Id.*
4. **INJUNCTION IS NOT GRANTED UNLESS COMPLAINANTS ARE ENTITLED TO DAMAGES AT LAW** and the remedy at law is not adequate. *Id.*
5. **INJUNCTION MAY BE GRANTED TO RESTRAIN ACTS OF AGENTS OF STATE**, engaged in the prosecution of a public work, when the injury resulting to individuals is not compensated, and amounts to a nuisance liable to continue, or causes damages likely to be irreparable; or by decree the nuisance may be abated. *Id.*
6. **WHERE GIST OF BILL FOR INJUNCTION OF PUBLIC WORK** is the want of a culvert, which would prevent the threatened injury, and which the complainants allege they were authorized to construct, it will be presumed, in the absence of any allegation to the contrary, that sufficient time has elapsed to enable them to procure the culvert; and the injunction will be refused. *Id.*

- 7. INJUNCTION WILL NOT ISSUE TO RESTRAIN VENDOR FROM ENTERING ON LAND**, appropriating the crop, and threatening to sell the premises. *Peterson v. Orr*, 484.

See **NEGOTIABLE INSTRUMENTS**, 22.

INSOLVENCY.

See **BANKRUPTCY AND INSOLVENCY**.

INSTRUCTIONS.

See **CONTRACTS**, 12; **CRIMINAL LAW**, 27; **PLEADING AND PRACTICE**, 25, 33-35.

INSURANCE—FIRE.

- 1. WRITING INTENDED TO BE PART OF CONTRACT MAY BE INCORPORATED INTO IT** by a proper reference, as well as by an extended recital. And where in a policy of insurance a reference is made to a survey consisting of answers given by the insured to questions proposed by the insurers, some of which are intended to call forth a minute description of the premises to be insured, and others to enable the insurers to determine the nature and extent of the risk, the reference will not be regarded as intended merely to obtain a fuller description, but as intended to incorporate the whole of the survey into the policy, and the answers therein applicable to the subject-matter will bind the insured. *Sheldon v. Hartford Fire Ins. Co.*, 420.
- 2. ANSWER IN POLICY OF INSURANCE TO QUESTION WHETHER WATCHMAN IS EMPLOYED** on the premises during the night is a representation material to the risk, which must be regarded as obligatory on the insured. *Id.*

INSURANCE—MARINE.

- 1. WARRANTY OF SEAWORTHINESS DURING WHOLE VOYAGE** is the same, as a general rule, whether the insurance be on the ship or on goods; and the underwriters are not bound for any loss resulting from that cause commencing after the voyage. *Lapene v. Sun Mutual Ins. Co.*, 668.
- 2. UNSEAWORTHINESS EXISTING AT COMMENCEMENT OF VOYAGE**, which is remedied before loss, will not bar a recovery under the policy. *Id.*
- 3. DEVIATION FROM COURSE OF VESSEL WILL NOT VITIATE POLICY** of insurance when the deviation has occurred through necessity. *Id.*

INTEREST.

See **ATTACHMENTS**, 10; **CO-TENANCY**, 7; **WITNESSES**.

INTERLOCUTORY ORDERS.

See **PLEADING AND PRACTICE**, 36.

INTOXICATING LIQUORS.

See **CORPORATIONS**, 21; **CRIMINAL LAW**, 28.

JOINDER OF PARTIES.

See **CO-TENANCY**, 8, 9; **FORCIBLE ENTRY AND UNLAWFUL DETAINER**, 1; **LANDLORD AND TENANT**, 4.

JOURNALS.

See **EVIDENCE**, 4, 5.

JUDGMENTS.

1. JUDGMENTS AND DECREES BIND PARTIES AND PRIVIES ONLY, and privity exists only where there is identity of interest. *Winston v. Westfeldt*, 278.
 2. JUDGMENT OF SUPREME COURT AFTER TERM at which it was rendered has elapsed is final and conclusive. *Rawdon v. Rapley*, 370.
 3. JUDGMENT OF SUPREME COURT IS NOT SET ASIDE OR VACATED by a continuance of the cause and leave to file a motion for reconsideration and a written argument at the next term. *Id.*
 4. JUDGMENT LIEN IS PARAMOUNT TO JUNIOR MORTGAGE LIEN. *Troppe v. Richardson*, 338.
 5. LIEN OF JUDGMENT IN FEDERAL COURT IS, BY ANALOGY TO STATE LAWS, CO-EXTENSIVE with the territorial jurisdiction of the court. *Id.*
 6. EQUITABLE LIEN.—IF DEBTOR BE LIVING, CREDITOR ACQUIRES BY JUDGMENT a lien upon all the real estate to which such debtor has the legal title, and by judgment and execution he acquires a like lien upon all the personal property of such debtor. If such debtor has equitable title to either real or personal property, equity, in aid of the law, carries along the lien and enforces it against such property. But either the judgment, or judgment and execution, must first have been obtained, in order to create the lien. *Unknown Heirs v. Kimball*, 638.
 7. JUDGMENT ON FORFEITED DELIVERY BOND IS NOT VOID because actual notice has not been given the securities therein. *Wright v. Yell*, 336.
 8. LEGAL EFFECT OF JUDGMENT ON FORFEITED DELIVERY BOND is a satisfaction and discharge of the original judgment while the second judgment remains in force. *Id.*
 9. JUDGMENTS OF COURTS OF GENERAL JURISDICTION ARE NULLITIES where the circumstances of the case make it an exception to the general jurisdiction of the court. *Per Lumpkin, J. Tucker v. Harris*, 488.
 10. JUDGMENT OF DISTRICT COURT REVISING MAGISTRATE'S JUDGMENT UPON ITS MERITS is without authority, and void. *Horan v. Wahrenberger*, 145.
 11. JUDGMENT OF SUPREME COURT IS VOID IF RENDERED on appeal from district court in a case where the judgment of the district court was without authority, and void. *Id.*
 12. JURISDICTION IS PRESUMED IN FAVOR OF JUDGMENT OF COURT OF GENERAL JURISDICTION; but must be shown in case of a judgment of a court of limited jurisdiction. *Id.*
 13. JUDGMENT OF ANY COURT HAVING NO JURISDICTION OF SUBJECT-MATTER IS VOID. *Id.*
 14. JUDGMENT RENDERED WITHOUT JURISDICTION IS NOT LESS VOID because rendered under an unconstitutional act giving jurisdiction. *Id.*
 15. JUDGMENT MAY BE ASSIGNED LIKE CHOSE IN ACTION: *Clark v. Moss*, 11 Ark. 736. *Wright v. Yell*, 336.
 16. IF JUDGMENT AT LAW IS REVERSED, it abrogates the whole judgment, and places the parties to the action in a position as if the judgment had never been rendered. *Tarleton v. Goldthwaite's Heirs*, 296.
 17. DEFENDANT IN SCIRE FACIAS CAN NOT AVAIL HIMSELF OF ANY GROUND OF DEFENSE which was open to him in the suit of which that is a continuation, *semble*. *Smith v. Eaton*, 746.
- See ASSIGNMENT OF CONTRACTS; ATTACHMENTS, 3, 4, 8; EQUITY, 7-9; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 11; JURISDICTION; MAR-

RIED WOMEN, 2; MORTGAGES, 6, 12, 14; NEGOTIABLE INSTRUMENTS, 23; NEW TRIALS, 6; PLEADING AND PRACTICE, 5, 24, 25, 30, 31, 36, 42, 47; PROBATE COURTS; PROCESS, 1; SURETYSHIP, 6, 8; TRESPASS, 2; WITNESSES, 8.

JUDICIAL NOTICE.

See EVIDENCE, 1; PROBATE COURTS.

JURISDICTION.

- 1. NOTHING IS INTENDED IN FAVOR OF JURISDICTION OF INFERIOR COURTS; but if the jurisdiction is shown, everything will be intended in favor of the judgment. *Tucker v. Harris*, 488.**
 - 2. APPEAL CAN NOT CONFER ON COURT JURISDICTION THAT COURT A QUO DID NOT POSSESS. *Horan v. Wahrenberger*, 145.**
 - 3. STATE HAS UNCONTROLLED JURISDICTION OVER ALL PROPERTY, real or personal, within its jurisdiction. *Smith v. Eaton*, 746.**
 - 4. COURT HAS NO JURISDICTION WHERE DEFENDANTS RESIDE WITHOUT STATE and have no property within it; and the suit will be abated if objection to its maintenance is seasonably interposed by plea or motion. *Id.***
 - 5. MAGISTRATE HAS NO AUTHORITY TO ORDER OFFENDER TO BE IMPRISONED until he pay a fine or be otherwise discharged by due course of law, in a case where the law only authorizes the magistrate to sentence the offender to stand committed for thirty days in default of payment of the fine. *Gurney v. Tufts*, 777.**
- See CONFLICT OF LAWS, 3; CRIMINAL LAW, 22, 23; EQUITY; ESTATES OF DECEDENTS, 6; INJUNCTIONS; JUDGMENTS, 9, 12-14; PARTITION; PROBATE COURTS; PROCESS; TRESPASS, 2.**

JURY AND JURORS.

- 1. SEPARATION OF JURY WITHOUT LEAVE OF COURT, AFTER THEY ARE SWORN, is not sufficient ground for setting aside verdict, either in a criminal or civil case, where the court is satisfied that the party complaining has not and could not have sustained any injury. *Roberts v. State*, 528.**
- 2. BURDEN IS ON PROSECUTION, IN CASE OF IRREGULAR SEPARATION OF JURY, to satisfy the court that the prisoner has sustained no injury therefrom. *Id.***
- 3. VERDICT WILL NOT BE DISTURBED BECAUSE OF IRREGULAR SEPARATION OF JURY, if the court assumes the burden of fairly and properly inquiring into the circumstances, in part by an examination of the jurors upon oath, and is satisfied that nothing has occurred which may be injurious to the prisoner. *Id.***
- 4. MISTAKE IN STATING TITLE OF CASE IN ENTERING VERDICT is a mistake of the clerk, not of the jury. *Ramsey v. McCauley*, 134.**
- 5. AFFIDAVIT OF JUROR CAN NOT BE RECEIVED TO IMPEACH HIS VERDICT by showing that he misapprehended the evidence, or what were his impressions as to the effect of his finding, or that he intended something different from what he found by their verdict. *Clark v. Carter*, 485.**
- 6. VERDICT OF "GUILTY ON THE FIRST COUNT" of an indictment is a general, not a special, verdict. *Roberts v. State*, 528.**
- 7. VERDICT OF "GUILTY ON THE FIRST ACCOUNT" may be corrected with respect to the orthography of the word "count," by an erasure, under the direction of the court, of the syllable "ac." *Id.***

8. VERDICT WILL NOT BE SET ASIDE WHEN AUTHORIZED BY EVIDENCE. *Emmerson v. Claywell*, 645.

See CONSTITUTIONAL LAW, 9-14; CONTRACTS, 12; CORPORATIONS, 20; CRIMINAL LAW, 1, 27-29; EXECUTIONS, 32; NEGLIGENCE, 9; NEGOTIABLE INSTRUMENTS, 14; NEW TRIAL; SALES, 11; SLANDER, 1; TROVER, 2; TRUSTS AND TRUSTEES, 2.

JUSTIFICATION.

See CRIMINAL LAW, 38, 39; OFFICES AND OFFICERS; PROCESS; SLANDER, 2, 3; TRESPASS, 2.

LANDLORD AND TENANT.

1. LEASE IS NOT VOID FOR UNCERTAINTY IN DESCRIPTION which describes the premises as a tract adjoining a certain farm, and formerly occupied by a certain person, containing a specified number of acres. *Emerick v. Towner*, 217.
 2. TENANT ALIENATING PART OR ALL OF PREMISES REMAINS LIABLE to his lessor in an action to recover possession of the whole premises, if possession be withheld after termination of the tenancy, whether such alienation be by sublease or by conveyance in fee with warranty, and whether the action be ejectment or unlawful detainer. *Id.*
 3. LESSOR MAY RECOVER ENTIRE PREMISES DEMISED, and not merely the part actually occupied by the defendants, in an action for unlawful detainer against his tenant holding over after disclaimer, and against one in possession under such tenant, and may show by parol what was demised. *Id.*
 4. PURCHASER IN FEE UNDER TENANT IS NOT ENTITLED TO NOTICE TO QUIT before the lessor can maintain an action for unlawful detainer against him and the tenant jointly, where the tenant has received notice to quit or has made a formal disclaimer. *Id.*
 5. NOTICE TO QUIT IS UNNECESSARY WHERE FORMAL DISCLAIMER has been made by a tenant holding over, before bringing an action against him for unlawful detainer. *Id.*
 6. TENANT HOLDING OVER AFTER EXPIRATION OF LEASE IS TENANT FROM YEAR TO YEAR upon the conditions specified in the lease, if the lessor receives rent subsequently accruing, or otherwise indicates an intent to recognize him as such tenant; otherwise, he is merely a tenant at sufferance, not entitled to notice to quit. *Id.*
 7. TENANT'S POSSESSION DOES NOT BECOME ADVERSE by his holding over and disclaiming to hold under the lessor, and claiming the fee, unless full notice thereof is brought home to the lessor. *Id.*
 8. CONVEYANCE IN FEE BY TENANT IS NO DISSEISIN of the lessor, except at the latter's election. *Id.*
- See EVIDENCE, 22; FORCIBLE ENTRY AND UNLAWFUL DETAINER; SPECIFIC PERFORMANCE, 3; VENDOR AND VENDEE, 5.

LAW OF THE LAND.

See CONSTITUTIONAL LAW, 10.

LEASE.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2, 4.

LEGISLATURE.

See CONSTITUTIONAL LAW; NEW TRIAL, 5; STATUTES.

LEGITIMACY.

See MARRIAGE AND DIVORCE, 4, 5.

LETTERS OF CREDIT.

See GUARANTY.

LEVY.

See EXECUTIONS.

LEX DOMICILII.

See CONFLICT OF LAWS, 4.

LICENSES.

See CORPORATIONS, 21; DEEDS, 6.

LIENS.

See EQUITY, 4; EXECUTIONS, 14, 15, 18, 19, 38; JUDGMENTS, 4-6; MORTGAGES, 6, 8; TAXATION.

LIFE.

See EVIDENCE, 2.

LIGHT.

See DEEDS, 18.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

RULE OF LIS PENDENS DOES NOT APPLY TO TRANSFER OF NEGOTIABLE NOTE before maturity pending a suit to condemn the amount to the payment of a prior holder's debts. *Winston v. Westfeldt*, 278.

See ESTATES OF DECEDENTS, 5, 6.

MAINTENANCE.

CONVEYANCE BY DISSEISEE IS NOT VOID FOR MAINTENANCE where the consideration is the grantee's bond, by which he agrees to pay the grantor a certain amount if the title proved to be valid in suits he would immediately bring to recover possession. *Pratt v. Pierce*, 758.

See CONTRACTS, 11; MORTGAGES, 3.

MALICE.

See CORPORATIONS, 15; CRIMINAL LAW, 35; MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

1. PLAINTIFF MUST PROVE BOTH WANT OF PROBABLE CAUSE AND MALICE to maintain an action for malicious prosecution. *Griffin v. Chubb*, 85.

2. **ACQUITTAL DOES NOT RAISE PRESUMPTION OF WANT OF PROBABLE CAUSE** in an action for malicious prosecution. *Id.*
3. **MALICE IS NOT LEGAL PRESUMPTION OR NECESSARY INFERENCE** from want of probable cause in an action for malicious prosecution. *Id.*
4. **MALICE MAY BE INFERRED FROM WANT OF PROBABLE CAUSE** in an action for malicious prosecution when there are no circumstances to rebut the presumption that malice alone could have suggested the prosecution; and it may be inferred where the defendant's conduct will admit of no other interpretation, except by presuming gross ignorance. *Id.*
5. **WANT OF PROBABLE CAUSE CAN NOT BE INFERRED FROM MOST EXPRESS MALICE.** *Id.*
6. **EVIDENCE THAT DEFENDANT IN ACTION FOR MALICIOUS PROSECUTION** acted under the advice of counsel, obtained in good faith, upon information of the real facts of the case, is admissible under the general issue for the purpose of rebutting evidence of malice. *Id.*
7. **PLAINTIFF MUST ALLEGE WANT OF PROBABLE CAUSE AND MALICE** in action for malicious prosecution. A general denial puts these averments in issue. The burden of proof is upon the plaintiff; and under the general denial the defendant may introduce evidence of any facts in direct rebuttal of evidence introduced by the plaintiff without specially pleading them. *Id.*

See CORPORATIONS, 12, 15.

MANDAMUS.

1. **MANDAMUS DOES NOT LIE TO ADMIT ONE PERSON INTO OFFICE** which is already filled by another as officer *de facto*. *People v. Olds*, 398.
2. **DISTINCTION BETWEEN MANDAMUS AND QUO WARRANTO** exists as much under our statute as at common law. *Id.*
3. **MANDAMUS LIES ONLY TO PREVENT FAILURE OF JUSTICE**, and where there is not a specific remedy in the ordinary course of law; and there should be not only a lack of a specific legal remedy, but there should be a specific legal right. *Id.*
4. **SECTION 468 OF PRACTICE ACT** is but a reaffirmance of the common law. It provides that the writ of *mandamus* "shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." It shall issue in no other cases than those therein provided for. *Id.*
5. **TITLE TO OFFICE IN POSSESSION OF ANOTHER**, exercising the duties as officer *de facto*, can not be tried upon *mandamus*. Further, the writ will not lie in this case, as the statute provides a plain, speedy, and adequate remedy. *Id.*
6. **MANDAMUS CAN GIVE NO RIGHT**, not even the right of possession, although it may enforce one. *Id.*

MANSLAUGHTER.

See CRIMINAL LAW. 33, 35.

MARINE INSURANCE.

See INSURANCE—MARINE.

MARRIAGE AND DIVORCE.

1. **MARRIAGE IS EMPHATICALLY PERSONAL CONTRACT**, having for its basis the mutual consent of the parties. *McKinney v. Clarke*, 59.
2. **COURTS OF EQUITY CAN NOT UPON APPLICATION** of third persons dissolve the bonds of matrimony, nor relieve against any of the consequences resulting from a marriage entered into from fraudulent motives. *Id.*
3. **MARRIAGE WHEN ANNULLED FOR FRAUD** must be such a fraud as operates upon one or other of the immediate parties to the contract. *Id.*
4. **PROOF OF FACTS FROM WHICH LEGAL MARRIAGE MAY BE REASONABLY INFERRED** is sufficient evidence of marriage to establish legitimacy of a child of the marriage. *Pratt v. Pierce*, 758.
5. **PRESUMPTION THAT MARRIAGE PERFORMED BY ORDAINED MINISTER WAS LEGALLY PERFORMED** exists where there is no proof that it was not legally performed; and a marriage in one town by the ordained minister of another town is valid in the absence of proof that neither of the parties was a resident of the latter town, and that there was an ordained minister in the town where the ceremony was performed. *Id.*
6. **ACTS OF CRUELTY WITH SPECIFICATIONS AS TO TIME AND PLACE** should be stated in petition for divorce on the ground of cruelty. *Nogees v. Nogees*, 78.
7. **CONDONATION OF ACTS OF CRUELTY IS BAR TO DIVORCE** only when there is no further ill treatment; but if there be fresh cruelty, the former acts will be revived, and the impediment raised by the reconciliation removed. *Id.*
8. **DIVORCE FOR ADULTERY IS BARRED BY CONDONATION UNDER TEXAS STATUTE**, but this effect of reconciliation is not extended beyond causes for adultery. *Id.*
9. **RULES AND DOCTRINES OF ECCLESIASTICAL LAW RESPECTING DIVORCE MUST BE ENFORCED** so far as they are applicable, and especially when their justice and good sense demand assent. *Id.*
10. **IT IS IMMATERIAL WHETHER OR NOT ACT BE UNLAWFUL** that is charged by husband against wife and used as a pretext for cruelty; indeed, if the act were totally inoffensive in itself, so much the more flagrant would be the violence threatened or inflicted on account of such act. *Id.*
11. **CHARGE OF THEFT ACCOMPANIED WITH THREATS OF BODILY INJURY** from which danger to life, limb, or health may be justly apprehended, justifies divorce on the ground of cruelty, though such criminatory charges are not in themselves sufficient. *Id.*
12. **THREAT ALLEGED IN PLEADINGS IN DIVORCE SUIT AS AGAINST LIFE** may be inferred on appeal to have been at least a threat of bodily injury, though the statement of facts does not show its nature. *Id.*
13. **THREATS OF ONE WHOSE PREVIOUS ACTS HAVE ENDANGERED LIFE** of threatened party, and have shown his temper to be brutal and ungovernable, justify the apprehension that the cruelties once inflicted may be repeated. *Id.*
14. **DIVORCE FOR CRUELTY MAY BE GRANTED** when, from all the circumstances, it appears that one of the parties justly apprehends danger to life, limb, or health. *Id.*
15. **MERE BLOWS DO NOT NECESSARILY CONSTITUTE CRUELTY**, for they may be unaccompanied with apprehension of danger to life, limb, or health, and may cause but slight unhappiness. *Id.*

See COSTS, 1.

MARRIED WOMEN.

1. CONVEYANCE BY WIFE OF HER SEPARATE PROPERTY IN DISCHARGE OF DEBT chargeable exclusively upon and incurred for the preservation of her separate estate will be sustained, without her privy examination, under the statute, if made voluntarily, and without any imposition being practiced upon her. *Womack, Adm'r, v. Womack*, 119.
 2. MARRIED WOMAN MAY BE SUED FOR RECOVERY OF DEBT incurred in the preservation of her separate estate, and if judgment be recovered against her, execution may be levied on her separate property. On proper application, the levy might be restrained to the proceeds first, and if they proved insufficient, then to be made on the *corpus*; but in the absence of specific directions, the levy would be carried into effect on the property of the wife in the same mode in which executions against property are usually enforced. *Id.*
 3. MARRIED WOMAN IS BOUND BY HER FRAUDULENT REPRESENTATIONS, voluntarily made, in reference to her separate property. If she makes admissions and representations in respect to her rights of property, by which others are deceived and induced to give credit to her husband on the faith of the property, she will be precluded from asserting her claim against the rights of those who have confided in and acted upon her representations and admissions, whether they were true or false. *Crawens v. Booth*, 112.
 4. STATUTE PRESCRIBING MODE OF CONVEYING WIFE'S PROPERTY does not declare absolutely void any other mode of conveyance; its only object seems to have been to secure freedom of will and action on her part. If she was free to act and so declared, and further declared that she did not wish to retract, all the circumstances concurred which were made necessary by law to pass her title to property, and her conveyance will be sustained, notwithstanding the want of a privy examination under the statute, particularly in a case where the party dealing with her can not be restored to his former position. *Womack, Adm'r, v. Womack*, 119.
 5. PROCEEDS OF SALE OF PROPERTY DEVISED TO WIFE ARE HER SEPARATE PROPERTY. *Huston v. Curl*, 110.
 6. MARRIED WOMAN'S SILENCE MAY PREJUDICE HER RIGHTS. *Bradley v. Snyder*, 564.
 7. WIFE MAY ACT AS AGENT OF HUSBAND, and a note payable to her may be indorsed by her in her own name, and if done with the assent of the husband, the indorsee acquires a valid title. *Krebs v. O'Grady*, 312.
 8. WIFE WILL BE REGARDED AS FEME SOLE when her husband has abandoned her and left the state without an intention of returning. *Id.*
- See CRIMINAL LAW, 8-10; DOWER; EXECUTIONS, 4, 5; HUSBAND AND WIFE; WILLS, 5, 8.

MASTER AND SERVANT.

1. REGULATION OF MANUFACTURING CORPORATION THAT EMPLOYEES MUST GIVE NOTICE before quitting the company's employment, or else forfeit their wages accrued, is valid and binding upon employees with notice. *Harmon v. Salmon Falls Mfg. Co.*, 718.
2. CLAUSE THAT WAGES ACCRUED SHALL BE FORFEITED IS ESSENTIAL in order that regulation of employer that employees shall give notice of intention

to leave his employment may be a defense in an action for the wages. *Id.*

3. ONE WILLFULLY VIOLATING CONTRACT, AND THEREBY EXPOSING HIMSELF TO AGREED PENALTY or forfeiture, can obtain relief neither at law nor in equity. *Id.*
4. RECOVERY OF COMPENSATION FOR SERVICES PERFORMED ON CONTRACT BROKEN by the plaintiff can be had only where there has been no willful violation, or where performance has been waived, or other legal excuse exists. *Id.*
5. EMPLOYEE IS BOUND BY NOTICE OF EMPLOYER'S REGULATIONS, otherwise valid, without signing them. *Id.*
6. EMPLOYEE CONTINUING TO WORK FOR EMPLOYER AFTER PRINTED COPY OF EMPLOYER'S REGULATIONS were delivered to him, must be considered as having agreed to them. *Id.*
7. STIPULATION IN EMPLOYER'S REGULATIONS THAT PAYMENT OF WAGES shall not be made without compliance therewith is a sufficient clause of forfeiture. *Id.*
8. BURDEN OF PROOF IS ON EMPLOYEE TO SHOW that he left by employer's permission, or had worked as long as he agreed to, when seeking to recover compensation for services performed, if he had notice of employer's regulation requiring notice of intention to quit, and stipulating a forfeiture of wages in default thereof. *Id.*
9. OBJECTION THAT CONTRACT IS NOT MUTUAL IN CASE OF REGULATION OF EMPLOYER requiring notice of employee's intention to quit, because the employer may discharge employee without giving him notice, is untenable. It is not necessary that each party to a contract assume precisely the same obligations. *Id.*
10. NO LIMITATION OF TIME DURING WHICH EMPLOYEE WAS NOT TO BE PAID being inserted in employer's regulation providing for such forfeiture if the employee gives no notice of intention to quit, it will be intended to operate upon all the wages earned subsequent to the last settlement. *Id.*
11. SUM ALLOWED TO EMPLOYEE FOR BOARD, "in addition" to "thirteen cents per piece" for weaving, is a payment in part for services in weaving, and will be forfeited, together with other wages. *Id.*

See CORPORATIONS, 14.

MASTERS.

See SHIPPING, 6, 7.

MEMORANDUM.

See EVIDENCE, 14; STATUTE OF FRAUDS, 2.

MINISTERS.

See MARRIAGE AND DIVORCE, 5.

MISJOINDER OF PARTIES.

See PLEADING AND PRACTICE, 12, 13.

MISREPRESENTATION.

See AGENCY, 2; MARRIED WOMEN, 3; SALES, 2, 7, 14; SURETYSHIP, 13.

MISTAKE.

See CONTRACTS, 12; EQUITY, 4, 5; FRAUD, 1; JURY AND JURORS, 4, 7.

MONEY HAD AND RECEIVED.

See FACTORS, 1.

MORTGAGES.

1. PAROL EVIDENCE IS NOT ADMISSIBLE TO GIVE EFFECT OF MORTGAGE TO CONTRACT in form an absolute sale of the property described. *Bryant v. Crosby*, 767.
2. MORTGAGE IS MERE COLLATERAL SECURITY FOR PAYMENT OF DEBT, and the taking of a mortgage does not operate as an extinguishment of the debt, or as a suspension of the remedy, unless there is an express agreement to that effect. *Burke v. Cruger*, 102.
3. ON CONVEYANCE OF FARM WITH MORTGAGE BACK, CONDITIONED FOR SUPPORT of grantor and his wife, the grantor is not bound to receive the support at the farm, and the grantee must furnish it at a place where the grantor elects to receive it. *Norton v. Webb*, 745.
4. INDEX CONSTITUTES NO PART OF RECORD under the Vermont statutes, and a mortgage, to the record of which no index or alphabet was made by the town clerk, becomes an incumbrance upon the land from the time it is transcribed upon the record, postponing a subsequent deed. *Curtis v. Lyman*, 174.
5. IF MORTGAGE AS IT APPEARED IN RECORD LACKED SIGNATURE, the registry is no record of the mortgage until the name of the mortgagor is placed upon the record book, and is not constructive notice of the mortgage. *Shepherd v. Burkhalter*, 523.
6. IF MORTGAGE IS NOT RECORDED IN TIME PRESCRIBED BY STATUTE, the lien of judgments obtained against the mortgagor will attach to the land; and if the land is sold under the judgment lien, the purchaser, whether he had notice of the unrecorded mortgage or not, takes the interest which was sold. This rule is not affected by the fact that the mortgagor gave notice at the sale, and that the sheriff proclaimed that he sold the land subject to the mortgage. *Id.*
7. GRANTEE OF EQUITY OF REDEMPTION HAS RIGHT TO REDEEM, notwithstanding a foreclosure and sale, when he was not made a party to the foreclosure proceedings; and it matters nothing to the mortgagee or those claiming under the mortgage, whether the conveyance of the equity of redemption was voluntary or even fraudulent as to creditors. *Bradley v. Snyder*, 564.
8. LIEN OF MORTGAGE IS NOT EXHAUSTED BY FORECLOSURE AND SALE OF MORTGAGED PREMISES: when the owners of the equity of redemption seek to redeem, it is from the mortgage and not from the sale under it. *Id.*
9. GRANTEE OF EQUITY OF REDEMPTION MUST PAY BALANCE DUE UPON MORTGAGE AFTER SALE UNDER FORECLOSURE, as well as the purchase money, in order to redeem, unless the mortgagor has paid such balance. *Id.*
10. PURCHASER UNDER FORECLOSURE SALE WILL BE ALLOWED FOR IMPROVEMENTS made by him upon the premises, less the rents and profits which he has enjoyed, upon redemption, where he not only supposed he had a good title and made the improvements in good faith, but the redemp-

- tioner stood by seeing the expenditures, and maintaining the profoundest silence as to his right to redeem. *Id.*
11. SURVIVING MORTGAGEE MAY MAINTAIN WRIT OF ENTRY TO FORECLOSE MORTGAGE. *Williams v. Hilton*, 729.
 12. TAXES ON MORTGAGED PREMISES PAID BY MORTGAGEE may be included in conditional judgment in his favor. *Id.*
 13. MORTGAGOR IS ESTOPPED FROM CONTENDING THAT TAXES PAID BY MORTGAGEE were illegal, unless he has notified the mortgagee of the illegality, and indemnified him against the loss of his rights under the mortgage, in case the final result of a contest of the tax should be in favor of the validity of a tax title. *Id.*
 14. TAXES PAID BY MORTGAGEE UPON OTHER PREMISES THAN THOSE INCLUDED IN MORTGAGE may be included in conditional judgment against the mortgagor, when the taxes paid were assessed upon the whole estate of the mortgagor without distinction between the mortgaged and unmortgaged property, since it was the mortgagor's duty to render the assessors a distinct description of the mortgaged premises, and thus enable the mortgagee to tender the amount assessed upon the mortgaged premises alone. *Id.*
 15. RIGHTS OF PARTIES IN ASCERTAINING AMOUNT FOR WHICH CONDITIONAL JUDGMENT shall be rendered in writ of entry by the mortgagee upon a mortgage, as regulated by the Maine statute, must be determined upon the same principles that would control were the mortgagor to bring his bill in equity to redeem the premises from the mortgagee. *Id.*
 16. TO REDEEM ESTATE FROM MORTGAGE, MORTGAGOR MUST PAY SUCH ADDITIONAL SUMS as the mortgagee has been compelled to pay to protect the estate from forfeiture in consequence of the laches of the mortgagor. *Id.*
 17. MORTGAGE CAN BE DISCHARGED ONLY BY PAYMENT IN FACT or by the release of the mortgagee. *Smith v. Stanley*, 771.
 18. WHERE MORTGAGEE RELEASES LAND FROM MORTGAGE given by the mortgagor, at the time when he took the conveyance, to secure the purchase money, the mortgagor's seisin has effect by relation from the time of the execution of the original deed, and his wife will be dowable therein. *Id.*
- See CORPORATIONS, 2; CO-TENANCY, 6; COVENANTS; DOWER; EQUITY, 5; EVIDENCE, 17, 18; EXECUTIONS, 14, 15, 18, 38; JUDGMENTS, 4; SCHOOLS, 1; TAXATION.

MOTIONS.

See ASSIGNMENT OF CONTRACTS; EXECUTIONS, 23-25, 35; NEW TRIAL, 1, 6; PLEADING AND PRACTICE, 29, 44.

MULTIPLICITY OF SUITS.

See EQUITY, 2.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 19-21.

MURDER.

See CRIMINAL LAW, 22, 33-39.

MUTUALITY.

See CORPORATIONS, 9; MASTER AND SERVANT, 9; SPECIFIC PERFORMANCE, 1.

NAMES.

See CONTRACTS, 6.

NAVIGABLE WATERS.

See WATERCOURSES.

NECESSARY PARTIES.

See PLEADING AND PRACTICE, 4.

NEGLIGENCE.

1. WHERE WRONGFUL ACT IMMEDIATELY CAUSING INJURY is the work and fault of one party alone, he shall be liable for it, although such damage be increased or entirely result through some previous neglect of the other party. *Wright v. Brown*, 622.
2. CARE AND DILIGENCE REQUIRED OF RAILROAD CORPORATION IN CONSTRUCTING FENCES AND CATTLE-GUARDS depend upon the locality of the road and the place through which it passes. *Trow v. Vermont Cent. R. R. Co.*, 191.
3. NEGLIGENCE TO CONSTRUCT FENCES AND CATTLE-GUARDS RENDERS RAILROAD CORPORATION LIABLE for injuries arising solely from that cause, when the omission was for a considerable distance in a place so public and common that it must know and reasonably expect that without such precautions injuries to horses and cattle will naturally and frequently arise. *Id.*
4. OWNER PERMITTING HORSE TO RUN AT LARGE UPON HIGHWAY IS CHARGEABLE WITH SAME DEGREE OF NEGLIGENCE, when he knows of the exposure and liability to injuries from passing trains, as is a railroad corporation in not constructing its fences and cattle-guards; and as much care and prudence is required of the owner in keeping his property from exposure to such injuries as is required of the corporation in guarding against their commission. *Id.*
5. MUTUAL NEGLIGENCE OF PLAINTIFF AND DEFENDANT DEFEATS ACTION, where the negligence of each party was the proximate cause of the injury. *Id.*
6. NEGLIGENCE OF PLAINTIFF DEFEATS ACTION WHERE HIS NEGLIGENCE WAS PROXIMATE and that of the defendant remote. *Id.*
7. NEGLIGENCE OF PLAINTIFF DOES NOT DEFEAT ACTION WHERE HIS NEGLIGENCE WAS REMOTE and that of the defendant proximate. *Id.*
8. NEGLIGENCE OR EVEN POSITIVE WRONG OF PLAINTIFF WILL NOT DEFEAT ACTION, if at the time when the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence. *Id.*
9. NEGLIGENCE IS MIXED QUESTION OF LAW AND FACT, upon which it is the duty of the court to specifically instruct the jury. *Id.*
10. ONE IS LIABLE FOR PLACING OR NEGLIGENCELY ALLOWING DELETERIOUS SUBSTANCE TO REMAIN in a place where damage accrues therefrom to another, either by the ordinary or extraordinary, and yet not very uncommon, action of the elements. *Woodward v. Aborn*, 699.

11. ONE IS LIABLE FOR DAMAGE CAUSED TO WATERS OF ANOTHER'S WELL by the action of an extraordinary rain upon manure which he has negligently left near the well. *Id.*
 12. EXTRAORDINARY CARE IS REQUIRED of a person or corporation who operates in the thronged thoroughfares of a city, for his own benefit, cars run by machinery, or who exercises in such thoroughfares any business which involves constant risk and danger. *Wilson v. Cunningham*, 407.
 13. OWNERS OF FLAT BOAT MOORED TO SHORE can recover damages from the owners of a steamboat for the destruction of said flat boat, caused by waves occasioned by said steamboat going too near thereto, under a full head of steam, and out of the usual channel. *Wright v. Brown*, 622.
 14. IT IS NO DEFENSE TO ACTION FOR WASHING FLAT BOAT FROM ITS MOORINGS and causing its destruction, on the part of a steamboat out of the usual channel, and under a full head of steam, to say that if the flat boat had been tied to the shore in an ordinarily secure manner it would have escaped injury. *Id.*
- See ATTORNEY AND CLIENT; BAILMENTS; EQUITY, 7, 8, 35; SPECIFIC PERFORMANCE, 3, 4; STATUTE OF LIMITATIONS, 8.

NEGOTIABLE INSTRUMENTS.

1. INDORSEMENT OF NOTE BEFORE MATURITY IS ABSOLUTE GUARANTY which runs as follows: "I assign and guarantee the within note to J. C. for value received." *Donley v. Camp*, 274.
2. GUARANTOR OF NOTE IS NOT ENTITLED TO NOTICE OF NON-PAYMENT, but is liable immediately upon non-payment at maturity. *Id.*
3. ALLEGATION OF MAKER'S INSOLVENCY IN ACTION AGAINST GUARANTOR of a note is surplusage, and evidence on that point is superfluous. *Id.*
4. GUARANTY INDORSED ON NOTE AFFIRMS ITS GENUINENESS and that of prior indorsements. *Id.*
5. PARTY TRANSFERRING NOTE FOR VALUE WARRANTS, by implication, that it is genuine, and free from any defects which would make it worthless. *Persons v. Jones*, 476.
6. TRANSFEREE OF INVALID NOTE IS ENTITLED TO RECOVER FROM TRANSFERRED the amount paid for the same, when ignorant of its defects. *Id.*
7. INDORSER IS LIABLE WITHOUT DEMAND AND NOTICE, IF HE HAS SECURITY in his hands fully equal to his liability, whether the security is taken before or after negotiation. *Marshall v. Mitchell*, 697.
8. PAYEE OF NOTE AFTER INDORSING IT WAIVES DEMAND AND NOTICE by agreeing with the maker, before its maturity, to take up and pay the note. *Id.*
9. PAYEE OF NOTE WAIVES DEMAND AND NOTICE FROM INDORSER by agreeing with the maker before the maturity of the note to take back the consideration of the note and to pay it, though the agreement be unexecuted. *Id.*
10. INDORSER MAY WAIVE PRESENTMENT AND NOTICE BY PROMISE TO PAY NOTE, made either before or after its maturity. *Lary v. Young*, 332.
11. STRONGER CIRCUMSTANCES WILL BE REQUIRED TO JUSTIFY INFERENCE OF WAIVER BY INDORSER of due demand and notice, where promise to pay is made after the maturity of the note than where it is made prior to the maturity. *Id.*

12. **PROMISE BY INDORSER TO PAY NOTE NEED NOT BE EXPRESS** in order to constitute waiver of demand and notice; but it will be sufficient if by reasonable intendment the language implies a promise to pay it. *Id.*
13. **PROMISE BY INDORSER TO PAY NOTE IS WAIVER OF DEMAND AND NOTICE**, though conditional as to the mode of payment. *Id.*
14. **WHETHER FACTS AND CIRCUMSTANCES SHOWN BY EVIDENCE AMOUNT TO WAIVER** by indorser of demand and notice is a matter of fact to be determined by the jury. *Id.*
15. **WAIVER OF DEMAND AND NOTICE BY INDORSER IS SUFFICIENTLY ESTABLISHED BY EVIDENCE** that upon being reminded by the indorser's attorney shortly before the maturity of the note of the approaching maturity, and the absence of the makers, the indorser replied that he owed the note, that it was all right, that he had indorsed it to pay it, and that if he was not there to pay it when it became due, his agent, who was present at the conversation, would do so, the latter having notes and accounts of the indorser's in his hands. *Id.*
16. **BILLS ARE NOT ACCOMMODATION PAPER, AND ACCEPTOR IS PRIMARILY LIABLE**, when the drawer has an open account with the acceptor at the time for goods consigned to the latter to be sold on commission, and the bills were drawn and accepted with the understanding that they were to be paid by the acceptor, and the amount entered into the general account; nor is the legal character of the bills affected by any alteration of the balance of the account, nor by the fact afterwards ascertained that at the time of the acceptance the drawer was indebted to the acceptor. *Farmers' and Mechanics' Bank v. Rathbone*, 200.
17. **RELEASE OF DRAWER OF BILL WILL NOT DISCHARGE ACCEPTOR**, where the bill is not accommodation paper, but is drawn and accepted against the drawer's account for goods consigned to the acceptor; the acceptor is the party primarily liable, and the drawer is considered only as his surety or guarantor. *Id.*
18. **INDORSEE OF BILL HAS RIGHT TO HOLD PARTIES LIABLE ACCORDING TO THEIR RELATIVE POSITIONS THEREON**, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral, where he takes the bill for value and before maturity, in ignorance that it was given for accommodation; and this right is unaffected by any subsequently acquired knowledge that the bill was so given. *Id.*
19. **RELEASE OF DRAWER OF BILL WILL NOT DISCHARGE ACCEPTOR** at law or in equity, where the bill was taken for value and before maturity, without notice that it was given for accommodation, although notice be subsequently acquired that it was so given. *Id.*
20. **BILL OF EXCHANGE PRESENTED FOR PAYMENT** at the office of the drawees to book-keeper of the latter, and not honored by him, held to be a sufficient presentment, and it was unnecessary for the notary to certify that the drawees were not present at the time of presentment. *Wesson v. Garrison*, 674.
21. **DRAWEE OF BILL HAS NO RIGHT TO DELAY HOLDER** by calling in the acceptor in warranty unless the former has paid the same. *Id.*
22. **NEGOTIABILITY OF NOTE IS NOT DESTROYED BY INJUNCTION** against its negotiation. *Winston v. Westfeldt*, 278.
23. **BONA FIDE INDORSEE OF NOTE BEFORE DUE IS NOT BOUND BY PRIOR DECREE** against his indorser subjecting the amount to satisfaction of the

debts of a prior holder, and he may recover on the note notwithstanding such decree and payment thereunder after the indorsement. *Id.*

- 24.** SUIT BROUGHT UPON PROMISSORY NOTE ON DAY IT FALLS DUE is premature, as the maker has all of that day in which to pay it. *Wilcombe v. Dodge*, 411.
- 25.** ONE WHO RECEIVES BANK BILLS AND GIVES HIS NOTE THEREFOR payable in money can not set up as a defense to an action on such note that the amount borrowed was not specie or its equivalent. *Southern Life Ins. & T. Co. v. Lanier*, 448.
- 26.** DISMISSAL OF ACTION AS TO ONE OF TWO JOINT AND SEVERAL MAKERS of a promissory note does not preclude the plaintiff from prosecuting the suit against the other. *Dean v. Duffield*, 108.
- See** ATTACHMENTS, 4, 5; CONFLICT OF LAWS, 2; EVIDENCE, 12, 17, 18; HUSBAND AND WIFE, 4; LIS PENDENS; MARRIED WOMEN, 7; STATUTE OF LIMITATIONS, 1, 14; SURETYSHIP, 11; USURY.

NEW PROMISE.

See STATUTE OF LIMITATIONS, 13, 14.

NEW TRIAL.

- 1.** TRIAL COURTS SHOULD NOT FALL INTO PRACTICE of regarding motions for new trial as mere matters of form. The means of doing justice are more extended in those courts, and further errors should be corrected by the court in which they were committed. *Floyd v. Ricks*, 374.
- 2.** PARTY ACQUIESCING IN SUFFICIENCY OF ADMISSIONS at the trial can not move for a new trial on the ground of surprise, after verdict has been rendered. *Clark v. Carter*, 485.
- 3.** NEW TRIAL WILL BE GRANTED upon the ground of newly discovered evidence, when it appears that the same could not be obtained previous to the rendition of the verdict, and that the same is material to the interest of the party applying. *Id.*
- 4.** VERDICT WILL BE SET ASIDE AS CONTRARY TO EVIDENCE where there was some improper bias or gross misapprehension influencing the jury to an extent shocking the understanding and the moral sense. *Shepherd v. Burkhalter*, 523.
- 5.** LEGISLATURE HAS NO POWER BY SPECIAL ACT TO GRANT NEW TRIAL of a suit at law. *Young v. State Bank*, 630.
- 6.** DEFENDANT WHO MOVES FIRST IN ARREST OF JUDGMENT can not afterwards take the opinion of the court below on the sufficiency of the evidence by a motion for a new trial, unless he brings himself within one of the recognized exceptions. *Bepley v. State*, 628.

See JURY AND JURORS, 1-3, 8.

NIL DICIT.

See PLEADING AND PRACTICE, 30.

NOMINAL DAMAGES.

See COVENANTS, 2.

NON-NEGOTIABLE NOTES.

See SURETYSHIP, 11.

NOTES.

See ATTACHMENTS, 4, 5; EVIDENCE, 12, 17, 18; HUSBAND AND WIFE, 4; LIS PENDENS; MARRIED WOMEN, 7; NEGOTIABLE INSTRUMENTS; STATUTE OF LIMITATIONS, 1, 14; SURETYSHIP, 11; USURY.

NOTICE.

REGISTRY IS NOTICE OF TENOR AND EFFECT OF INSTRUMENT recorded only as it appears upon that record. *Shepherd v. Burkhalter*, 523.

See ATTACHMENTS, 4, 5; BAILMENTS, 3; BONDS, 2; EVIDENCE, 1, 8, 22; EXECUTIONS, 23, 24, 35; GUARANTY, 3, 4; INJUNCTIONS, 2, 3; JUDGMENTS, 7; LANDLORD AND TENANT, 4-7; LIS PENDENS; MASTER AND SERVANT; MORTGAGES, 5, 6, 13; NEGOTIABLE INSTRUMENTS; PARTNERSHIP; PLEADING AND PRACTICE, 5, 30; PROBATE COURTS, 2; VENDOR AND VENDEE, 6.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 4-6.

NUISANCE.

ANY PRACTICE DEEMED INJURIOUS TO PUBLIC MAY BE DECLARED NUISANCE by the legislature, and punished as such. *Bepley v. State*, 628.

See EMINENT DOMAIN, 5-10; INJUNCTIONS, 1, 5.

OBJECTIONS.

See CRIMINAL LAW, 15; EASEMENTS; EXECUTIONS, 8; JURISDICTION, 4; PLEADING AND PRACTICE, 6, 7, 26.

OFFICES AND OFFICERS.

PARTY INELIGIBLE TO OFFICE OF CONSTABLE, although invested with the forms of office and his official acts deemed good and valid as to third persons, as if he were an officer *de jure*, can not when put on his own defense justify under his office. *Pearce v. Hawkins*, 54.

See AGENCY, 5, 6; CORPORATIONS, 14, 15, 17, 18; EMINENT DOMAIN, 5, 8, 10; MANDAMUS; PLEADING AND PRACTICE, 4; PROCESS; QUO WARRANTO; SCHOOLS; SHERIFFS; TRESPASS, 2.

OPINIONS OF WITNESSES.

See WITNESSES, 4, 5.

ORDERS.

See BANKRUPTCY AND INSOLVENCY, 2; COSTS, 4; EXECUTORS AND ADMINISTRATORS, 3, 8, 10; PLEADING AND PRACTICE, 36; PROBATE COURTS; SURETYSHIP, 4.

ORDINANCES.

See CORPORATIONS, 19, 20.

ORDINARY.

See PROBATE COURTS.

OUSTER.

See CO-TENANCY, 3.

PARENT AND CHILD.

See DEEDS, 14-16; MARRIAGE AND DIVORCE, 4, 5.

PAROL EVIDENCE.

See CORPORATIONS, 8; DEEDS, 2; EQUITY, 5; EVIDENCE, 16-23; EXECUTIONS, 26, 27, 30; LANDLORD AND TENANT, 3; MORTGAGES, 1.

PARTIES.

See ASSIGNMENT OF CONTRACTS; BANKRUPTCY AND INSOLVENCY, 1; CONFLICT OF LAWS, 3; CONTRACTS, 3-6, 12; CORPORATIONS, 16; DEEDS, 8; EQUITY, 12, 13; EXECUTIONS, 15; EXECUTORS AND ADMINISTRATORS, 10; GARNISHMENT, 6; JUDGMENTS, 1; MORTGAGES, 7; PLEADING AND PRACTICE, 4, 12, 13.

PARTITION.

1. PROBATE COURT MAY PARTITION REAL ESTATE AMONG HEIRS AND DEVISEES under Maine statute, and may set off to a devisee of net profits his portion of the land devised. *Earl v. Rowe*, 714.
2. POWER OF PROBATE COURT TO PARTITION DECEDENT'S REALTY AMONG HEIRS AND DEVISEES under Maine statute is not limited to any particular time or number of years after the estate is settled. *Id.*
3. JURISDICTION OF PROBATE COURT TO PARTITION DECEDENT'S REALTY IS NOT RESTRICTED under the Maine statute because the share or proportion may be uncertain, depending upon the construction or effect of any devise, unless it shall appear to the judge to be uncertain. *Id.*

See CO-TENANCY, 2; WILLS, 3.

PARTNERSHIP.

1. CREDIT MUST BE REGARDED AS GIVEN TO PARTNERSHIP where goods were delivered before any publication of its dissolution and the retiring partner remained in the store as clerk, but with the old sign up. *Amidown v. Osgood*, 171.
2. ACTUAL NOTICE OF DISSOLUTION OF PARTNERSHIP IS REQUIRED in order to exonerate a retiring partner as to those who have dealt upon the credit of the firm after its dissolution, but before notice thereof had been published. *Id.*
3. NOTICE OF DISSOLUTION OF PARTNERSHIP MUST BE ACTUAL as to those who have had previous dealings with the firm, and notice by publication is required as to others, in order to exonerate a retiring partner. *Id.*
4. PARTNERSHIP HAS LIMITED EXISTENCE AFTER DISSOLUTION, for the purpose of fulfilling engagements made during its existence; consequently the late members of a firm, by selling butter consigned to the firm of which they were recently members after its dissolution, by one having no notice of such fact, become liable to the consignor as partners. *Johnson v. Totten*, 412.
5. ACTUAL NOTICE OF DISSOLUTION OF PARTNERSHIP must be brought home to a party dealing with it in order to change the character of the partners' liability. *Id.*

PART PERFORMANCE.

See CONTRACTS, 8-10; STATUTE OF FRAUDS.

PATENTS.

See TRUSTS AND TRUSTEES, 4.

PAYMENT.

PAYMENT IS EQUIVALENT TO, AND WILL BE TREATED AS, PAYMENT IN CASH, when made in property or securities, if such payment is received as a full satisfaction of the demand. *Ralston v. Wood*, 604.

See ATTACHMENTS, 3; MORTGAGES, 2, 17.

PENALTIES.

See CONSTITUTIONAL LAW, 9, 14; CORPORATIONS, 19, 20; SCHOOLS, 1.

PERFORMANCE.

See CONTRACTS, 2, 8-10; DEEDS, 15; MASTER AND SERVANT; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

PERJURY.

See CRIMINAL LAW, 40; SLANDER, 2, 3.

PLEADING AND PRACTICE.

1. **REFORMED PLEADING UNDER CODE** has abolished the distinction between actions *ex contractu* and *ex delicto*, but the principles of law governing these actions remain unchanged. *Lubert v. Chauviteau*, 415.
2. **USE OF ARABIC NUMERALS AND LONG-USED AND WELL-UNDERSTOOD ABBREVIATIONS** to express time in complaint for crime is not fatal to the complaint. *State v. Reed*, 727.
3. **ALLEGATION THAT DEFENDANT "ON THE 14TH DAY OF DECEMBER, A. D. 1850,"** was guilty of the acts complained of does not render the complaint invalid because of the use of figures and abbreviations. *Id.*
4. **STATE IS NOT NECESSARY PARTY TO SUIT AGAINST COMMISSIONERS** engaged in prosecution of a public work, though the acts complained of be within the scope of their authority, for they must defend under the law and their authority; and even if made a party, it might be that the only way to afford the relief sought would be to enjoin her agents or officers. *Ex parte Martin*, 321.
5. **APPEARANCE OF PARTY ENTITLED TO NOTICE, AFTER JUDGMENT,** merely to give notice of appeal, is not such an appearance as will dispense with the necessity of notice. *McKinney v. Jones*, 83.
6. **MERE IRREGULARITIES IN PROCEEDINGS ARE CURED BY APPEARANCE** and pleading; and objection should be made the first opportunity the party has to bring his complaint before the court, and before the party committing the error has taken any further step in the cause. *Beall v. Blake*, 513.
7. **IF DEFECT TOTALLY INVALIDATES PROCEEDINGS,** the defendant may at any time apply to set them aside, even though the defendant be in execution. *Id.*
8. **MERE IRREGULARITY IN PROCEEDINGS MAY BE WAIVED,** but a complete defect can not be waived. *Id.*
9. **BILL IS TO BE TAKEN MOST STRONGLY AGAINST PLEADER.** *Ex parte Martin*, 321.
10. **DEMURRER TO PLEAS ADMITS THEIR TRUTH.** *Wallace v. Holly*, 518.

11. **MATTERS DEHORS BILL SHOWING WANT OF INTEREST IN COMPLAINANT** can not be set up by way of demurter, but must be raised by plea. *Southern Life Ins. & T. Co. v. Lanier*, 448.
12. **WHERE PARTY IS IMPROPERLY MADE CO-PLAINTIFF WITHOUT HIS PRIVITY** or consent, the proper course is to move that his name be stricken out, not that the bill be dismissed even as to him. *Id.*
13. **DEMURRER ON GROUND OF MISJOINDER OF PARTY PLAINTIFF** must be presented *in limine*, and if not so presented, the right to demur will be deemed waived. *Id.*
14. **DEFECTIVE DECLARATION SHOULD BE TAKEN ADVANTAGE OF** by demurter, or in arrest of judgment. *Beals v. Olmstead*, 150.
15. **DEFENDANT CAN NOT BE REQUIRED TO PLEAD SPECIALLY** facts which amount to no more than a denial of the plaintiff's averments; or facts which it will only become material for the defendant to prove for the purpose of rebutting evidence introduced by the plaintiff; or that which is but evidence of a material, issuable fact. *Griffin v. Chubb*, 85.
16. **SUIT IN EQUITY PENDING IN COURT OF ANOTHER STATE BETWEEN SAME PARTIES**, and for the same matter, is not cause for abatement of an action at law subsequently commenced in Connecticut. *Hatch v. Spofford*, 433.
17. **PROCEEDINGS BEGUN IN SISTER STATE TO SUBJECT PROPERTY OF DEBTOR TO SALE** to satisfy a debt will not act as a bar to action begun in Tennessee to enforce payment of the same debt. *Lockwood v. Nye*, 73.
18. **SEPARATE TRIALS MAY BE ALLOWED**, in the discretion of the court, when there are several defendants in ejectment and the testimony of one is material for his co-defendant. *Young v. Adams*, 654.
19. **BY COMMON-LAW RULE OF PRACTICE, SEVERAL ACTIONS WILL BE CONSOLIDATED** into one when the same plea may be pleaded and the same judgment given on all the counts; or when the counts are of the same nature and the same judgment may be given on them all, though the pleas may be different. *Logan v. Mechanics' Bank*, 507.
20. **RULE AS TO CONSOLIDATING SUITS UNDER OUR PRACTICE** is, that when the plaintiff institutes different suits upon separate and distinct notes or demands, which are all due, and may be joined in the same action against the same defendant, and such defendant or his counsel makes it satisfactorily appear to the court that the defense to all the notes or demands is the same, or that there is no defense to them, then the plaintiff may be compelled to consolidate them into one action; but if no such facts are shown to appear to the court below, a motion to consolidate will be overruled. *Id.*
21. **WHERE CHANGE OF VENUE HAS BEEN IMPROPERLY ORDERED**, the court to which the transfer was made may direct it to be retransferred to the court where it belongs. *Rogers v. Watrous*, 100.
22. **REFUSAL TO ADMIT IRRELEVANT TESTIMONY AFTER PARTY HAS CLOSED HIS CASE** is not erroneous. *Greer v. Caldwell*, 553.
23. **REFUSAL TO ADMIT FURTHER EVIDENCE AFTER CLOSE OF TESTIMONY** is discretionary and not revisable, though the testimony was in itself competent. *Gilbert v. Gilbert*, 268.
24. **ERRONEOUS ADMISSION OF EVIDENCE UNNECESSARY** to make out the case of the party offering it is no ground of reversal. *Donley v. Camp*, 274.

25. **ERRONEOUS INSTRUCTION IN FAVOR OF PARTY ENTITLED TO RECOVER** as matter of law upon the pleadings and evidence is no ground of reversal. *Id.*
26. **GENERAL OBJECTION TO EVIDENCE** which does not distinguish between the legal or illegal may be overruled. *Smoot v. Eslava*, 310.
27. **EXCEPTION TO TESTIMONY THAT IT WAS ILLEGAL WITHOUT SPECIFYING GROUND** of illegality is not well taken. *Ingram v. Little*, 549.
28. **ERRONEOUS ADMISSION OF INTERROGATORY, WHICH IS WITHDRAWN** afterwards without answer, is no ground of exception. *Emerick v. Towner*, 217.
29. **MOTION TO DISMISS SUIT MUST BE FOR DEFECTS APPEARING ON RECORD**, and can not be made upon proof *aliunde*. *Conn. & P. R. R. Co. v. Bailey*, 181.
30. **AMENDMENT—JUDGMENT BY NIL DICIT** was entered against defendant, whose pleas had been filed, but not so entered by the clerk. The record was afterwards amended, without notice to plaintiff, so as to show that such pleas had been filed. *Held*, that such amendment was proper; that plaintiff should have taken advantage of his want of notice by application to have the amendment set aside; that in the absence thereof, the pleas should be considered part of the record; consequently the judgment by *nil dicit* was erroneous, and should be reversed. *Young v. State Bank*, 630.
31. **AMENDMENT OF RECORD OF JUDGMENT CORRECTING MISTAKE IN NAMES** provided for by statute, in which there is no limitation as to time within which it may be made, may be made at any time before final judgment has been rendered in the supreme court. *Ramsey v. McCauley*, 134.
32. **QUESTION DECIDED WITHOUT ARGUMENT IS OPEN TO CONSIDERATION.** *Griffin v. Chubb*, 85.
33. **INSTRUCTION IS FAULTY IN ASSUMING TITLE IN PLAINTIFF**, when that is the question in controversy. *Warren v. Jacksonville*, 610.
34. **INSTRUCTIONS SHOULD NOT ASSUME FACTS** as proved, but should be hypothetical; nor should instructions be given based upon evidence rejected by the court. *Floyd v. Ricks*, 374.
35. **WHERE EVIDENCE IS CONFLICTING**, on a question of fact material to the defense, the plaintiff is not entitled to a charge asserting his right to a recovery on the whole evidence. *Woolfork v. Sullivan*, 305.
36. **DISTRICT COURT CAN NOT IN GENERAL REVISE ITS OWN JUDGMENT** of a former term, but when an interlocutory order has been inadvertently or erroneously made, which, after judgment on appeal, may occasion a reversal of the judgment, it may before final judgment correct such erroneous order, if susceptible of being corrected without prejudice to the rights of the parties. *Rogers v. Watrous*, 100.
37. **QUESTION WILL NOT BE CONSIDERED ON APPEAL** when not raised in the court below. *Amidown v. Osgood*, 171.
38. **APPEAL IN ITSELF LEGAL AND CORRECT IS NOT INVALIDATED** by the fact that the magistrate who granted it compelled the appellant to give bond for his appearance in an amount greater than could be lawfully required of him. The law will in such case afford a remedy for the unlawful act of the magistrate, but the appeal will still be valid. *State v. Gurney*, 782.

39. SUPREME COURT WILL PRESUME THAT AMENDMENT TO PETITION WAS DISREGARDED by the court below, where the record does not anywhere show that it was acted on and approved by the court, and where the evidence and rulings might just as well have occurred on a trial upon the original as upon the amended petition. *Pridgin v. Strickland*, 124.
 40. AMENDMENT SHOULD NOT BE PERMITTED TO SUBSTITUTE NEW CAUSE OF ACTION. *Id.*
 41. PRAYER FOR RELIEF NEED NOT BE LOOKED TO FOR GROUNDS OF ACTION. *Id.*
 42. ORIGINAL PROOF TO SUPPLY FATAL DEFECT IN PROCEEDINGS so as to retain defendant in custody under the execution upon which he has been arrested will not be allowed where the defendant moves to vacate the judgment on the ground that it appeared from the record in the case that no process had been attached to the original declaration, and where, up to the time the motion was made, no attempt was ever made to make it appear that process was attached to the original writ. *Beall v. Blake*, 513.
 43. STATEMENT IN LETTER ANNEXED AS EXHIBIT TO BILL, and prayed to be taken as part of it, will, unless qualified in some manner, become the statement of the bill. *Minter v. Branch Bank*, 315.
 44. PARTY CAN NOT COMPLAIN OF ERROR COMMITTED ON HIS MOTION. *Seabury v. Stewart*, 254.
 45. DECISION ON MATTER OF DISCRETION IS NOT REVISABLE on error. *Id.*
 46. WHERE JOINT DEMISE BY THREE IS ALLEGED, AND NAMES OF TWO ARE STRUCK OUT on the defendant's motion in an action of ejectment, he can not complain because the name of the third was permitted to remain, purporting a sole demise. *Id.*
 47. ERRONEOUS ADMISSION OF EVIDENCE, WHICH BECOMES IRRELEVANT and immaterial by the exclusion of evidence which it was intended to rebut, is no ground of reversal. *Id.*
- See ARBITRATION AND AWARD; ASSIGNMENT OF CONTRACTS; ATTORNEY AND CLIENT; BAILMENTS, 2; BANKRUPTCY AND INSOLVENCY, 1, 2; CONSTITUTIONAL LAW, 9; CONTRACTS, 5-7, 12; COSTS; CO-TENANCY, 8, 9; CRIMINAL LAW; EJECTMENT; EQUITY, 12, 13; ESTATES OF DECEDENTS, 1; EVIDENCE; EXECUTIONS, 8, 15, 20, 23-25, 32, 35; EXECUTORS AND ADMINISTRATORS, 3, 7; FACTORS, 2, 4; FORCIBLE ENTRY AND UNLAWFUL DETAINER; GUARANTY, 5; INJUNCTIONS; JUDGMENTS, 17; JURISDICTION, 4; JURY AND JURORS; MALICIOUS PROSECUTION, 6, 7; MANDAMUS, 4; MARRIAGE AND DIVORCE, 6, 12; NEGLIGENCE, 9; NEGOTIABLE INSTRUMENTS, 3; NEW TRIAL; PROCESS, 8; SALES, 11; SCHOOLS; SLANDER, 1; SURETYSHIP, 9; TRUSTS AND TRUSTEES; WITNESSES, 6, 7.

PLEAS.

See CRIMINAL LAW, 16, 17, 19, 20; PLEADING AND PRACTICE, 10, 11, 15, 30.

PLEDGES.

See FACTORS, 5-7.

POISONS.

See CRIMINAL LAW, 12, 14.

POLICE POWER.

See CONSTITUTIONAL LAW, 8.

POSSESSION.

See ATTACHMENTS, 11; CONFLICT OF LAWS, 3; Co-TENANT, 3, 4; EVIDENCE, 22; EXECUTIONS, 2, 16, 36-38; EXECUTORS AND ADMINISTRATORS, 13; FORCIBLE ENTRY AND UNLAWFUL DETAINER, 3, 4; FRAUDULENT CONVEYANCES; LANDLORD AND TENANT, 2, 3, 7; PUBLIC LANDS; REPLEVIN; SALES, 5, 6, 10; STATUTE OF LIMITATIONS, 2; VENDOR AND VENDEE; WATERCOURSES, 6, 7.

POWERS.

See CORPORATIONS, 3; EXECUTORS AND ADMINISTRATORS, 4-6; RAILROADS, 1; RELEASE.

PRACTICE.

See PLEADING AND PRACTICE.

PREFERENCES.

See DEEDS, 9.

PRESCRIPTION.

RIGHT BY PRESCRIPTION CAN NOT BE RAISED AGAINST OWNER'S CONSENT; but the use may be so long unobjected to as to authorize the finding of an implied consent, and to raise the presumption of consent, and even of grant. *Warren v. Jacksonville*, 610.

See STATUTE OF LIMITATIONS.

PRESENTMENT.

See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS, 7; NEGOTIABLE INSTRUMENTS; SURETYSHIP, 3.

PRESUMPTIONS.

See AGENCY, 5; DEEDS, 8; EVIDENCE, 2, 5; EXECUTIONS, 4; EXECUTORS AND ADMINISTRATORS, 3; FRAUDULENT CONVEYANCES, 1; HUSBAND AND WIFE, 3; INJUNCTIONS, 6; JUDGMENTS, 12; JURISDICTION, 1; MALICIOUS PROSECUTION; MARRIAGE AND DIVORCE, 5; PLEADING AND PRACTICE, 39; PRESCRIPTION; PROBATE COURTS, 2; STATUTE OF LIMITATIONS, 9; TRUSTS AND TRUSTEES, 2.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIORITY.

See ATTACHMENTS, 8; DEEDS, 9.

PRIVIES.

See DEDICATION; DEEDS, 8; JUDGMENTS, 1.

PRIVITY OF ESTATE.

See EJECTMENT, 1.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURTS.

1. COURT OF ORDINARY HAS RIGHT TO ORDER SALE OF REAL ESTATE belonging to an intestate; the act of 1816 does not limit this jurisdiction, but simply directs the mode in which it shall be exercised. *Tucker v. Harris*, 488.
 2. ON SALE OF LAND BY COURT OF ORDINARY, if the record shows that the application was made in proper form, and after due and legal notice, the court will presume that it was made fully and plainly to appear that the sale would be for the benefit of the heirs and creditors of the estate. *Id.*
 3. JUDGMENT OF COURT OF ORDINARY IS CONCLUSIVE and binding on every other court until reversed, and it can not be collaterally impeached, however erroneous and irregular. *Id.*
 4. RIGHTS ACQUIRED UNDER JUDGMENTS OF COURTS OF ORDINARY before they are displaced will be protected. *Id.*
 5. PROBATE COURTS CAN NOT ORDER SALE OF REAL ESTATE unless everything necessary to give them jurisdiction of the person and of the subject-matter appears upon their records. *Id.*
 6. COURT OF ORDINARY IS CLOTHED WITH GENERAL JURISDICTION over testate and intestate estates in this state. *Id.*
- See ESTATES OF DECEDENTS, 4-6; EXECUTORS AND ADMINISTRATORS, 2, 10, 11; PARTITION; SURETYSHIP, 4, 6.

PROCEDURE.

See PLEADING AND PRACTICE.

PROCESS.

1. SUCH EQUITABLE DOCTRINES ARE TO BE SANCTIONED as, being consistent with the principles of law, will protect officers enforcing process under a void judgment, and will meliorate the harshness of the rule as to the effect of jurisdictional mistakes. *Horan v. Wahrenberger*, 145.
2. SHERIFF ACQUIRES SPECIAL PROPERTY in money collected by him under execution, and if such money is at any time subject in his hands to other process, he can not serve it himself, but it must be executed by the coroner. *Clymer v. Willis*, 414.
3. WARRANT ISSUED BY MAGISTRATE FOR ARREST OR IMPRISONMENT SHOULD BE UNDER SEAL; and if the warrant is not under seal, it is void, and the proceedings had thereunder will be quashed. *State v. Drake*, 757.
4. MAGISTRATE'S WARRANT OF COMMITMENT MUST ON ITS FACE SHOW HIS AUTHORITY to commit, in order to justify the officer who executes it. *Gurney v. Tufts*, 777.
5. OFFICER WILL BE PROTECTED IN OBEYING PRECEPT SUFFICIENT IN POINT OF FORM and issued by a court or magistrate having jurisdiction of the subject-matter. *Id.*

6. OFFICER IS NOT PROTECTED BY PROCESS ON FACE OF WHICH IT APPEARS that the person held under it was never arrested or arraigned; that he never pleaded to any complaint, nor suffered a default; and that no proof of his guilt had been offered nor any trial been had. *Id.*
 7. WHERE WARRANT SHOWS THAT MAGISTRATE HAD NO JURISDICTION over the person or over the offense, the officer is not obliged to make service of it; and in doing so, he becomes a trespasser. *Id.*
 8. WAIVER OF PROCESS CONTEMPLATED BY ACT OF 1840 is one to be made at the commencement of the suit, and before the same is brought into court and filed with the clerk, and intends an actual waiver, and not one that is implied by appearance and pleading. *Beall v. Blake*, 513.
 9. SERVICE CAN NOT RENDER PROCESS OPERATIVE which is so utterly vitiated, with or without appearance, with or without the consent of the defendant, as to be null and void. *Id.*
- See EXECUTIONS, 8, 38; PLEADING AND PRACTICE, 42; TRESPASS, 2.

PROCLAMATIONS.

See CRIMINAL LAW, 21.

PROMISSORY NOTES.

See ATTACHMENTS, 4, 5; EVIDENCE, 12, 17, 18; HUSBAND AND WIFE, 4; LIS PENDENS; MARRIAGE AND DIVORCE, 7; NEGOTIABLE INSTRUMENTS; STATUTE OF LIMITATIONS, 1, 14; SURETYSHIP, 11; USURY.

PROPONENT.

See WILLS, 2.

PUBLIC AGENTS.

See AGENCY, 5, 6.

PUBLIC LANDS.

BY PURCHASING LAND FROM UNITED STATES, the purchaser acquires title to all improvements and crops growing thereon, whether severed or unsevered. Consequently, a mere possessor of public land who has planted a crop thereon can not maintain trespass against a purchaser who enters and removes such crop. *Floyd v. Ricks*, 374.

See TRESPASS, 3; TRUSTS AND TRUSTEES, 4.

PUBLIC USE.

See DEDICATION; EASEMENTS; EMINENT DOMAIN.

QUANTUM MERUIT.

See CONTRACTS, 10; EXECUTORS AND ADMINISTRATORS, 9.

QUESTIONS OF LAW AND FACT.

See CRIMINAL LAW, 28; EXECUTIONS, 32; NEGLIGENCE, 9; NEGOTIABLE INSTRUMENTS, 14; SALES, 11.

QUITCLAIM DEEDS.

See DEEDS, 3, 23, 24.

QUO WARRANTO.

QUO WARRANTO IS PROPER REMEDY TO TRY TITLE TO OFFICE. *People v. Olds*, 398.

See MANDAMUS, 2.

RAILROADS.

1. RIGHT IS GIVEN TO EXTEND ROAD TO AND UNITE WITH ANY OTHER ROAD WITHIN PRESCRIBED LIMITS, by a general power conferred upon a railroad company by its charter, "to extend to and unite its railroad with any other railroad now constructed, or which may hereafter be constructed in this state;" and this power is not limited by other provisions declaring that certain proceedings for the condemnation of lands shall be taken in a particular county. *Belleville & Illinoistown R. R. Co. v. Gregory*, 589.
2. FENCES AND CATTLE-GUARDS MUST BE ERECTED AND MAINTAINED by the Vermont Central Railroad Company upon their road, sufficient to prevent horses and other animals from passing thereon. *Trow v. Vermont Central R. R. Co.*, 191.
3. GRANTOR OF RIGHT OF WAY TO RAILROAD COMPANY through his property is not bound to fence the same, nor is the company under legal obligation to do so. *Louisville & Frankfort R. R. Co. v. Milton*, 647.
4. GRANTOR OF RIGHT OF WAY TO RAILROAD COMPANY who permits his stock to run upon the road does so at his own risk, unless he retains the right to continue the use of that portion of the property as a pasture. *Id.*
5. RAILROAD COMPANY ARE NOT LIABLE FOR INJURIES DONE TO LIVE-STOCK straying upon the road unless the injury could have been avoided by its agents, with due regard to the safety of the train and its contents. *Id.*
6. NO RIGHT OF ACTION ACCRUES AGAINST RAILROAD COMPANY WHEN STOCK RUNNING AT LARGE upon railroad are accidentally killed by train running at customary rate of speed. *Id.*

See CONSTITUTIONAL LAW, 4-7; NEGLIGENCE.

RATIFICATION.

See CONTRACTS, 3; FACTORS, 3.

RECORDS.

See CONSTITUTIONAL LAW, 3; DEEDS; EXECUTIONS, 26; MORTGAGES, 4-6; NOTICE.

REDEMPTION.

See MORTGAGES, 7-10, 16.

REFORMATION OF CONTRACTS.

See EQUITY, 5.

REFORMED PROCEDURE.

See PLEADING AND PRACTICE, 1.

REGISTRY.

See CONSTITUTIONAL LAW, 3; DEEDS; EXECUTIONS, 26; MORTGAGES, 5; NOTICE; SHIPPING, 3.

REGULATIONS.

See MASTER AND SERVANT.

RELATION.

See COSTS, 3; MORTGAGES, 18.

RELEASE.

POWER TO RELEASE ABSOLUTE DEBT NECESSARILY INCLUDES AUTHORITY to release a contingent liability. *Shaw v. Berry*, 702.

See DEEDS, 3, 22, 23; EXECUTORS AND ADMINISTRATORS, 4, 5; MORTGAGES, 17, 18; NEGOTIABLE INSTRUMENTS, 17; WITNESSES, 3.

REMAINDERS.

See ATTACHMENTS, 1.

REMEDIES.

See CONSTITUTIONAL LAW, 2; EQUITY, 1, 5; INJUNCTIONS, 4; MANDAMUS; MORTGAGES, 2; QUO WARRANTO; SHIPPING, 4; SPECIFIC PERFORMANCE.

RENTS.

See CO-TENANCY, 6-8; EXECUTORS AND ADMINISTRATORS, 2; GUARDIAN AND WARD; LANDLORD AND TENANT, 6; STATUTE OF FRAUDS, 3.

REPAIRS.

See SHIPPING, 6, 7.

REPEALS.

See STATUTES, 7-11.

REPLEVIN.

REPLEVIN WILL LIE IN ALL CASES where the plaintiff has a present right to the possession of any personal property in the possession of the defendant. *Shaddon v. Knott*, 63.

REPRESENTATIONS.

See INSURANCE—FIRE, 2; MARRIED WOMEN, 3; SALES, 2, 7, 14; SURETSHIP, 13.

RESCISSION OF CONTRACTS.

See CONTRACTS, 3; DEEDS, 16; SPECIFIC PERFORMANCE, 5; VENDOR AND VENDEE, 6.

RESERVATION.

See DEEDS, 17-20.

RES GESTÆ

See EVIDENCE, 15, 20, 21; WILLS, 12.

RESULTING TRUSTS.

See TRUSTS AND TRUSTEES, 1.

RETROSPECTIVE LAWS.

See CONSTITUTIONAL LAW.

RETURN.

See EXECUTIONS, 4, 23-26, 28.

REVERSAL.

See JUDGMENTS, 16; PLEADING AND PRACTICE, 24, 25, 47; WITNESSES, 8.

REWARDS.

See CRIMINAL LAW, 21

RIPARIAN RIGHTS.

See WATERCOURSES.

ROBBERY.

See CRIMINAL LAW, 17, 18, 24.

SALES.

1. **CONTRACT IS CONDITIONAL SALE, AND NOT BAILMENT**, where property is delivered to one for a certain consideration, and no option is given to the purchaser upon any contingency to return it, and none is given to the seller to reclaim it, except upon the purchaser's failure to make payment or to retain possession. *Bryant v. Crosby*, 767.
2. **DESCRIPTION OF PROPERTY SOLD AS IN "GOOD ORDER AND CONDITION"** is equivalent to a representation that it was in such condition, and the seller would be guilty of fraud if he knew it was not, although the description is contained in a contract of sale signed only by the purchaser and his surety. *Id.*
3. **SALE OF PERSONAL PROPERTY IS COMPLETE** as soon as both parties have agreed to its terms. *Shaddon v. Knott*, 63.
4. **AS BETWEEN PARTIES, ACTUAL DELIVERY IS NOT ESSENTIAL TO VALIDITY OF SALE.** *Griffin v. Chubb*, 85.
5. **SALE IS COMPLETE UPON COMPLETION OF CONTRACT**, and right of property and of possession vest in the purchaser upon payment of the price and delivery of a bill of sale, without actual delivery of the property. *Id.*
6. **VALIDITY OF SALE IS NOT AFFECTED AS BETWEEN PARTIES** by possession remaining with the vendor, if it be consistent with the terms of the contract. *Id.*
7. **SALE IS VOID FOR FRAUD, IF VENDOR WAS INDUCED TO MAKE SALE** by misrepresentations made to him by the purchaser in respect to material facts peculiarly with his knowledge, by which the seller was deceived to his injury. *Id.*
8. **DELIVERY OF CHATTEL TO VENDEE BEFORE SEIZURE THEREOF UNDER EXECUTION** against the vendor is sufficient to vest title in the vendee as against the creditor levying the execution. *Bartlett v. Blake*, 775.
9. **CLAUSE IN BILL OF SALE OF UNFINISHED CHATTEL** allowing the vendee the right to take the same at will does not authorize the vendee, at his election, to repudiate the contract and annul the sale. *Id.*
10. **IMPLIED WARRANTY OF TITLE ARISES WHEN VENDOR IS IN POSSESSION** of the chattel by himself or by his servant at the time of the sale; but

where, at the time of sale, the chattel is on the land and in the possession of a third person, no warranty of title arises. *Huntingdon v. Hall*, 765.

11. **VENDOR'S STATEMENTS SHOULD BE SUBMITTED TO JURY** to determine whether they constitute a warranty of quality, unless it is apparent that they were understood by the parties at the time as amounting to nothing more than recommendations and matters of opinion merely, and the vendee was still left to understand that he must examine and judge for himself, and unless there is a fatal variance. *Beals v. Olmstead*, 150.
12. **VENDOR'S STATEMENTS OUGHT TO BE REGARDED AS WARRANTY OF QUALITY**, when they form the sole basis of the sale, there being no opportunity to examine the chattel, and no examination in fact attempted; when they are positively made with reference to matters upon which the vendor professes, and is supposed to have, knowledge; or when the chattel was bought for a particular use, and the vendor knew that the vendee would not buy an inferior article. *Id.*
13. **WARRANTY THAT CHATTEL IS FIT FOR PARTICULAR USE IS ORDINARILY IMPLIED**, when it is sold for such a use. *Id.*
14. **SELLER IS NOT GUILTY OF FRAUD IN MISREPRESENTING CONDITION OF GOODS** sold, unless he knew that his representations were false. *Bryant v. Crosby*, 767.
15. **VENDOR'S IGNORANCE OF MANNER IN WHICH GOODS SOLD BY HIM HAVE BEEN PACKED** will not exempt him from liability for the difference between the value of the packages in their actual condition and what it would have been if the packages had been uniform and corresponded with the samples by which the sale was effected. The measure of damages in such cases is the difference in value of the actual contents and the contents represented to be in the packages at the time and place of sale. *Fuller v. Cowell*, 676.

See **CONSTITUTIONAL LAW**, 8; **EQUITY**, 4; **EXECUTIONS**; **EXECUTORS AND ADMINISTRATORS**, 4, 8, 12, 13; **FACTORS**; **FRAUDULENT CONVEYANCES**; **GUARANTY**; **MORTGAGES**, 1; **PROBATE COURTS**.

SAMPLES.

See **SALES**, 15.

SCHOOLS.

1. **PENALTY FOR NOT PAYING SCHOOL MONEY LOANED WHEN DUE**, provided by the Illinois school laws, is imposed only on the borrower, is not assignable, and is not a part of the contract contained in the bond or mortgage given to secure the money loaned, and must be enforced by a special count. *Bradley v. Snyder*, 564.
2. **IN ASSUMPSIT FOR SERVICES RENDERED AS SCHOOL-TEACHER**, evidence is admissible to prove that the defendant contracted with the plaintiff individually, and not as a public officer. *Ogden v. Raymond*, 429.
3. **SCHOOL TRUSTEE DERIVING HIS OFFICIAL CHARACTER FROM GENERAL LAW** and the election of the people of a given district is as much a public agent as if he were the immediate agent of the state or of one of its political divisions. *Id.*

SCIRE FACIAS.

See EXECUTIONS, 15, 18; JUDGMENTS, 17.

SEALS.

See DEEDS, 6; PROCESS, 2.

SEAMEN.

See SHIPPING, 1-4,

SEAWORTHINESS.

See INSURANCE—MARINE.

SEISIN.

See MORTGAGES, 18.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 2, 3; MARRIED WOMEN.

SEPARATE TRIAL.

See PLEADING AND PRACTICE, 18.

SEPARATION OF JURY.

See JURY AND JURORS.

SEQUESTRATION.

See EQUITY, 6.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

See PROCESS, 7, 9.

SET-OFF.

See GUARDIAN AND WARD.

SETTLEMENT.

See CONTRACTS, 11; STATUTE OF LIMITATIONS, 2.

SHERIFFS.

AUTHORITY OF DEPUTY SHERIFF CONTINUES AFTER EXPIRATION OF SHERIFF'S TERM with respect to all duties which may be performed by deputy, unless the authority is revoked or the sheriff dies. *Tyres v. Wilson*, 212.

See ATTACHMENTS, 2, 11; EXECUTIONS.

SHERIFF'S DEED.

See EXECUTIONS, 30, 36; STATUTE OF LIMITATIONS, 4.

SHERIFFS' SALES.

See EXECUTIONS; MORTGAGES, 6; PROCESS, 2; SURETYSHIP, 4.

SHIPPING.

1. **HIRER OF VESSEL ON SHARES IS OWNER** for time in which he controls her under the contract, and the general owner is not liable on the hirer's contracts of shipment for supplies or for seamen's wages. *Giles v. Vigoreux*, 704.
 2. **HIRER OF VESSEL ON SHARES BEING REGARDED AS OWNER**, and having the benefit of the services of seamen hired by him, no implied *assumpsit* for compensation for such services can arise against the general owner. *Id.*
 3. **ENROLLMENT OR REGISTRY OF VESSEL DOES NOT MAKE OWNER LIABLE** for seamen's wages when the vessel is let on shares. *Id.*
 4. **EXISTENCE OF REMEDY IN REM FOR SEAMEN'S WAGES** lays no foundation for a right of action *ex contractu* against the general owner who has let the vessel on shares. *Id.*
 5. **PART OWNERS OF DISTINCT FRACTIONAL PORTIONS OF VESSEL ARE TENANTS IN COMMON** of the vessel. *McLellan v. Cox*, 736.
 6. **MASTER MAY BIND OWNERS FOR NECESSARY SUPPLIES AND REPAIRS** of their vessel, when he is their agent, but he can not bind them where no agency, express or implied, exists. *Id.*
 7. **MASTER HIRING VESSEL ON SHARES**, and having the sole control and management of her, and sailing, victualing, and manning her on his own account, is the owner *pro hac vice*, and has no agency or authority from the general owners to furnish her with supplies, and can not bind the owners for them. *Id.*
 8. **UNAUTHORIZED ADMISSIONS OF ONE PART OWNER OF VESSEL ARE NOT BINDING** upon the co-owners. *Id.*
- See EVIDENCE, 27; INSURANCE—MARINE; NEGLIGENCE, 13, 14; WITNESSES, 6.

SHORE.

See WATERCOURSES, 8.

SLANDER.

1. **SPECIAL DAMAGE NEED NOT BE ALLEGED OR PROVED IN ACTION FOR SLANDER** upon words actionable *per se*. Some damage is implied by law in such case, and the jury determines the amount, having reference to the degree of malice exhibited by the defendant, and the injurious consequences necessarily resulting to the plaintiff. *Newbit v. Statuck*, 706.
2. **TO SUSTAIN PLEA OF JUSTIFICATION IN ACTION FOR SLANDER** in charging perjury, the defendant must give as conclusive proof as would be necessary to convict the plaintiff of perjury on an indictment. *Id.*
3. **ALLEGED PERJURED TESTIMONY, HAVING BEEN INTRODUCED BY DEFENDANT** under plea of justification in an action for slander in charging perjury, is evidence of its own truth, although the plaintiff could not testify in his own case. *Id.*

SOVEREIGNTY.

See CONFLICT OF LAWS, 1; EMINENT DOMAIN; PLEADING AND PRACTICE, 4.

SPECIAL ACTS.

See NEW TRIAL, 5.

SPECIALTIES.

See EVIDENCE, 16.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE WILL NOT BE DECREED** when the remedy is not mutual or one party only is bound by the agreement. *De Cordova v. Smith*, 136.
2. **SPECIFIC PERFORMANCE WILL NOT BE DECREED** when there is strong, un rebutted *prima facie* evidence of a mutual abandonment of the contract. *Id.*
3. **PARTY ENTITLED TO SPECIFIC CONVEYANCE OF PROPERTY**, personal or real, will not be permitted to hold back from an assertion of his rights, and speculate upon the chances of such changes as may decide whether it would be to his interest to have the conveyance made; but he is required to be vigilant and prompt in the assertion of those rights; and if changes have occurred during this lapse of time in the value of the property to be conveyed, or in the consideration to be paid, a court of equity will always refuse its aid, and leave the party to seek redress where the law had left him by a suit for the breach of the covenant. *Id.*
4. **LACHES MAY BE IMPUTED TO ONE SEEKING SPECIFIC PERFORMANCE** from the time when the one against whom relief is sought has indicated by his acts or expressions his intention to abandon the contract. *Id.*
5. **BILL FOR SPECIFIC PERFORMANCE MAY BE AMENDED TO ASK RESCISSION**, together with other relief, in a suit on a contract to exchange lands, where it appears on the trial that the defendant can not make title. *Parrill v. McKinley*, 212.

See STATUTE OF FRAUDS, 1, 2, 10.

STARE DECISIS.

1. **DECISIONS AFFECTING RIGHT TO PROPERTY SHOULD BE UNIFORM AND STABLE**; but in cases where the settled rules and reasons of the law have been departed from, it becomes the duty of the court, before the error has been sanctioned by repeated decisions, to embrace the first opportunity to pronounce the law as it is. *Frink v. Darst*, 575.
2. **SOLITARY DECISION OF RECENT DATE HAS NEVER BEEN HELD TO CHANGE LAW IN ANY CASE**; and especially should it not have that effect where to adhere to it would be fraught with far greater injustice than could possibly arise from overruling it in the particular case. *Id.*

STATUTE OF FRAUDS.

1. **PART PERFORMANCE OF ORAL CONTRACT TO EXCHANGE LANDS** is sufficient to take it out of the statute of frauds and warrant specific enforcement where there has been delivery with acts of ownership on both sides. *Parrill v. McKinley*, 212.
2. **DEED EXECUTED BY DEFENDANT IS SUFFICIENT MEMORANDUM** under the statute of frauds, though not delivered, to support a decree for specific performance of a contract to exchange lands. *Id.*
3. **VERBAL PROMISE TO PAY RENT OF PREMISES OCCUPIED BY PROMISOR'S MOTHER** is void under the statute of frauds, where the mother entered the house at an agreed rental, and the plaintiff. being solicitous about the rent,

mentioned the matter to the defendant, who verbally promised to pay the rent during the time she should occupy the house; in such a case the defendant can be regarded only as a guarantor, and not as an original promisor. *Moses v. Norton*, 738.

STATUTE OF LIMITATIONS.

1. **IN ACTION TO RECOVER DAMAGES FOR SELLING PLAINTIFF NOTE VOID FOR USURY**, the statute of limitations runs from the day of the sale. *Persons v. Jones*, 476.
2. **WHERE POSSESSION WAS BEGUN** under an act which barred rights of entry after a lapse of twenty years, and that act was afterwards amended so as to bar the right after a lapse of ten years: *held*, that possessions commencing under the old law were governed by the act which first effected a bar in their favor. *Rawls v. Kennedy*, 289.
3. **WHERE SEPARATE DEMISES ARE LAID** from several co-tenants or coparceners, and the statute of limitations has effected a bar against one of the lessors, a recovery may be had on the demises from the others to the extent of their title. *Id.*
4. **STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN IN ACTIONS OF FRAUD** or deceit until the discovery had been made. *Persons v. Jones*, 476.
5. **WHERE EXECUTION SALE OF REAL ESTATE** had been made, but the sheriff's deed conveying the same was not executed for upwards of two years thereafter, *held*, that the statute of limitations began to run from the date of the sale. *Keaton v. Thomasson's Lessee*, 55.
6. **STATUTE OF LIMITATIONS DOES NOT APPLY IN CASES OF DIRECT, EXPRESS TRUST**, as between the trustee and his *cestui que trust*, but relief should be sought within a reasonable time. *Tarleton v. Goldthwaite's Heirs*, 296.
7. **WHEREVER THERE IS STATUTORY BAR AT LAW**, the same period is by analogy, or rather in obedience to the statute, adopted as a bar in equity. *Id.*
8. **BOTH COURTS OF LAW AND EQUITY TURN UNWILLING EAR** to those who show no vigilance in the assertion of their rights. *De Cordova v. Smith*, 136.
9. **LAPSE OF TIME CREATES PRESUMPTION THAT PARTIES HAVE WAIVED OR SETTLED THEIR RIGHTS**, and stale claims when brought into a court of chancery are received without favor, and entitled to but little consideration unless attended with circumstances that will repel such presumption. *Id.*
10. **EQUITY FOLLOWS ANALOGY OF LAW OF LIMITATIONS OF FORUM** in decreeing specific performance where there is no express limitation to the remedy. *Id.*
11. **QUERY AS TO APPLICATION OF RULE THAT EQUITY FOLLOWS ANALOGY OF STATUTE OF LIMITATIONS** in case where a conveyance of land is the relief sought. *Id.*
12. **BILL OF PARTY GUILTY OF GROSS LACHES OR APPLYING FOR RELIEF AFTER LONG LAPSE OF TIME** unexplained by equitable circumstances will be dismissed, unless a part has been performed or paid, when the defendant will be decreed to refund, to make compensation, or to a specific performance. *Id.*
13. **DEBT BARRED BY STATUTE OF LIMITATIONS IS SUFFICIENT CONSIDERATION** to support a new engagement or promise. *Womack v. Womack*, 119.

14. **BAR OF STATUTE OF LIMITATIONS IS REMOVED**, and the defendant is technically estopped from setting up the defense of the statute, where, more than six years after certain notes were made by him, he signed an agreement on the back of the notes, to the effect that he would "not take any advantage of the statute of limitations on the within two notes." *Burton v. Stevens*, 153.

STATUTES.

1. **MAJORITY OF ALL MEMBERS ELECTED TO EITHER BRANCH OF GENERAL ASSEMBLY MUST CONCUR IN FINAL PASSAGE OF BILL**, under the constitution of Illinois, in order that it shall become a law. *Spangler v. Jacoby*, 571.
 2. **VOTE MUST BE TAKEN BY AYES AND NOES AND ENTERED ON JOURNAL**, under the Illinois constitution, on the final passage of a bill by either branch of the general assembly. *Id.*
 3. **COURTS HAVE NOTHING TO DO WITH POLICY**, necessity, or expediency of a law. This is a matter for the consideration of the legislature. *Bepley v. State*, 628.
 4. **ALL SECTIONS OF ACT SHOULD BE CONSTRUED TOGETHER**, and each section should receive such a construction as will make it conform to common sense and justice. *Burnham v. Hays*, 389.
 5. **WORD IN STATUTE HAVING TWO SIGNIFICATIONS** should ordinarily be construed as generally understood in the community, but not where it would contravene the manifest intention of the legislature. *Favers v. Glass*, 272.
 6. **INTENTION OF LEGISLATURE AS EXPRESSED IN ANY PORTION OF LAW IS PROPERLY SOUGHT FOR** by looking into the whole law. *Belleville & Illinoistown R. R. Co. v. Gregory*, 589.
 7. **ONE PORTION OF LAW, TO QUALIFY, RESTRAIN, OR SUSPEND ANOTHER PORTION**, must appear to have been framed with that intention. *Id.*
 8. **EXPRESS PROVISION OF LAW CAN NOT BE REPEALED, OR ITS CONSTRUCTION CONTROLLED** by the presumed or even well-known views of the members of the legislature. The law alone can speak the legislative will. *Id.*
 9. **WHERE TWO STATUTES ARE SO INCONSISTENT** that they can not stand together, the last repeals the first. *Rawls v. Kennedy*, 289.
 10. **REPEALS BY IMPLICATION ARE NOT FAVORED IN LAW**; but a subsequent statute, revising the subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied. And though a subsequent statute be not repugnant in its provisions to a former one, yet if it was clearly intended to prescribe the only rules which should govern, it repeals the prior statute. *Rogers v. Watrous*, 100.
 11. **ACT OF 1843, PROVIDING FOR CHANGE OF VENUE** in cases where the judge was interested, is repealed by the act of 1846. *Id.*
- See **CONSTITUTIONAL LAW**; **CONTRACTS**, 1; **CORPORATIONS**, 1, 19-21; **CRIMINAL LAW**, 13, 14; **EQUITY**, 5; **EVIDENCE**, 3-5; **EXECUTIONS**, 11, 12; **EXECUTORS AND ADMINISTRATORS**, 1; **MANDAMUS**, 4; **MARRIED WOMEN**, 4; **NEW TRIAL**, 5; **NUISANCE**; **PROCESS**, 8; **STATUTE OF LIMITATIONS**, 2; **WATERCOURSES**, 9.

STOCK AND STOCKHOLDERS.

See **CORPORATIONS**.

SUBSCRIPTION.

ONE SUBSCRIBING FOR SHARES IN BUILDING ASSOCIATION IS NOT LIABLE on his subscription to a corporation formed of a part of the subscribers for the purpose of carrying out the designs of the association, when the subscription paper contains no provision concerning the incorporation of the association. There is no privity of contract. *Machias Hotel Co. v. Coyle*, 712.

See CORPORATIONS.

SUCCESSION.

See ESTATES OF DECEDENTS.

SUPPLIES.

See SHIPPING, 6, 7.

SUPPORT.

See CONTRACTS, 11; MORTGAGES, 8.

SUPREME COURT.

See JUDGMENTS, 2, 3, 11; PLEADING AND PRACTICE, 39.

SURETYSHIP.

1. **MERE INDULGENCE TO DEBTOR DOES NOT DISCHARGE SURETY** unless there is an agreement upon a sufficient consideration, and binding upon the creditor, to give time to the principal debtor. *Burke v. Cruger*, 102.
2. **TAKING COLLATERAL SECURITY, THOUGH OF HIGHER NATURE, FROM PRINCIPAL DEBTOR, or a stranger,** does not preclude the principal debtor from suing on the first contract, and consequently does not discharge the sureties upon it. *Id.*
3. **FAILURE ON PART OF CREDITOR TO PRESENT HIS CLAIM** to the administrator of the principal debtor within the statutory time after the grant of letters does not discharge the sureties of such principal, nor affect creditors' rights to proceed against them. *Minter v. Branch Bank*, 315.
4. **ORDER OF PROBATE COURT IS AS CONCLUSIVE AGAINST SURETY AS ADMINISTRATOR,** by section 126 of the Illinois statute of wills, when it adjudges that the administrator pay over moneys to a person entitled thereto; and if not complied with, entitles the person in whose favor it is made to recover upon the administrator's bond against both principal and surety. *Ralston v. Wood*, 604.
5. **SHERIFF'S SURETIES FOR FIRST TERM ARE LIABLE FOR DEPUTY'S DEFAULT,** AFTER EXPIRATION of a second term of the same sheriff, in collecting and not paying over money made on a *vend. ex.* issued on an execution levied by the deputy during such first term, where different sureties were given for the second term, and the same deputy again qualified, and was never removed, but continued to serve as deputy for such sheriff's successor, and as such returned the *vend. ex.* "satisfied." *Tyree v. Wilson*, 213.
6. **REMEDY OF SURETY ON ADMINISTRATOR'S BOND IS APPEAL** to the circuit court, under section 138 of the Illinois statute of wills, if he thinks the judgments of the probate court against his principal are unjust, or not warranted by law. *Ralston v. Wood*, 604.

7. **DEFENSE CAN NOT BE INTERPOSED BY SURETY** in a suit upon an administrator's bond when it was not set up by the administrator in proceedings against him in the probate court, in which he was ordered to pay over money in his hands to the heir; and it is also too late for the heirs of a co-surety to make it, when they are sued for contribution. *Id*
 8. **MERE DELAY BY ASSIGNEE OF JUDGMENT ON DELIVERY BOND** to sue out process after assignment will not discharge the surety on the bond unless the delay is by contract upon sufficient consideration without the surety's consent. *Wright v. Yell*, 336.
 9. **SURETIES MAY PLEAD ANYTHING WHICH THEIR PRINCIPAL MIGHT PLEAD** in his denial of liability on the bond. *Wallace v. Holly*, 518.
 10. **LIABILITY OF SURETIES OF DEPUTY IS CONTINUOUS WITH THAT OF THEIR PRINCIPAL**; their undertaking is to make good the official defaults of their principal. *Id*.
 11. **WHERE SURETY ON BOND DISCHARGES OBLIGATION OF HIMSELF AND PRINCIPAL** by giving his own negotiable note, which the obligee accepts in full satisfaction, he may maintain an action against his principal for the amount of such note before he pays it; but where he has discharged the obligation by giving a bond or other non-negotiable security, he can recover only the amount actually paid by him since giving the security. *Boulware v. Robinson*, 117.
 12. **FRAUDULENT CONCEALMENT OF FACTS FROM PRINCIPAL WILL NOT DISCHARGE SURETY** necessarily; the concealment which entirely discharges a surety is one of facts known to the other party and not known to him, and known to be of a character to materially increase the risk beyond that assumed in the usual course of business of that kind, he having a suitable opportunity to make them known to the surety. *Bryant v. Crosby*, 767.
 13. **SURETY CAN NOT BE DISCHARGED ON GROUND OF FRAUDULENT REPRESENTATIONS** made to his principal except when that principal would be. *Id*.
- See EVIDENCE, 16; EXECUTIONS, 22; GUARANTY; JUDGMENTS, 7; NEGOTIABLE INSTRUMENTS, 17.**

SURPRISE.

See NEW TRIAL, 2.

SURVEY.

See INSURANCE—FIRE, 1.

SURVIVORSHIP.

See MORTGAGES, 11.

TAXATION.

1. **TAXES LEGALLY ASSESSED UPON ESTATE CREATE LIEN THEREON**, and lay foundation for a title paramount to that derived by deed or mortgage. *Williams v. Hilton*, 729.
2. **TAXES LEGALLY ASSESSED CONSTITUTE LEGAL CHARGE, NOT UPON MORTGAGEE**, but upon the estate. *Id*.
3. **TAXES LEGALLY ASSESSED UPON MORTGAGED PREMISES** should be discharged by the mortgagor and those claiming under him while they are in possession. *Id*.

See MORTGAGES, 12-16.

TENANTS IN COMMON.

See CO-TENANCY.

TENANTS.

See LANDLORD AND TENANT; VENDOR AND VENDEE, 5.

TENANT AT SUFFERANCE.

See LANDLORD AND TENANT, 6.

TENANTS FROM YEAR TO YEAR.

See LANDLORD AND TENANT, 5.

TIDE-LANDS.

See WATERCOURSES, 8-11.

TIME.

See CRIMINAL LAW, 3, 4, 6, 8.

TITLE.

See EJECTMENT, 1; TRESPASS, 3; VENDOR AND VENDEE, 1, 8.

TITLE BONDS.

See VENDOR AND VENDEE, 1.

TORTS.

See CORPORATIONS, 12, 13; CO-TENANCY, 8, 9; FACTORS, 2-4.

TRESPASS.

1. ENTRY INTO MAN'S HOUSE, after a warning not to enter, does not necessarily constitute a forcible trespass. *Carroll v. State*, 282.
 2. OFFICER IS NOT TRESPASSER FOR LEVYING PROCESS REGULAR UPON ITS FACE, issued to enforce a judgment rendered by a court having jurisdiction of the subject-matter. *Wallace v. Holly*, 518.
 3. GENERAL ISSUE IN TRESPASS PUTS IN ISSUE BOTH FACT OF TRESPASS AND TITLE OF PLAINTIFF. It follows that any title, whether freehold or possessory, in the defendant is admissible in evidence; and for this purpose a certificate of the register of the land office that the defendants had located the land upon which the alleged trespass occurred is competent evidence. *Floyd v. Ricks*, 374.
- See AGENCY, 6; CRIMINAL LAW, 33, 34; DEEDS, 6; EMINENT DOMAIN, 8; EXECUTIONS, 2, 6; PROCESS, 7; PUBLIC LANDS; VENDOR AND VENDEE, 5.

TRIAL.

See PLEADING AND PRACTICE.

TROVER.

1. OLD RULE FOR MEASURE OF DAMAGES IN TROVER, viz., the value of the thing at the time of conversion, and interest thereon up to the entry of judgment, has no application to the remedial system of Texas. In that state the amount of damages will vary according to the particular property to which it may be applied. *Prilgin v. Strickland*, 124.

2. **OWNER OF SLAVE UNLAWFULLY DETAINED MAY RECOVER NOT ONLY HIS VALUE**, but also damages for the value of his services from the time of the demand up to the time of the trial. And the jury may find the value and the specific damages in distinct amounts. *Id.*

See CO-TENANCY, 9.

TRUSTS AND TRUSTEES.

1. **CESTUI QUE TRUST MAY MAINTAIN EJECTMENT** upon a demise in his own name, though the legal estate be still in the trustee, in a case where the purposes of the deed have been satisfied, and also in the case of a resulting trust. *Doggett v. Hart*, 464.
2. **WHERE CESTUI QUE TRUST BRINGS EJECTMENT, JURY IS PERMITTED TO PRESUME** that a regular surrender has been made by the trustee of his estate, thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action: 1. Where the purposes of the trust estate have been satisfied; 2. Where the beneficial occupation of the estate by the possessor induces a supposition that a conveyance of the legal estate has been made to the party beneficially interested; 3. Where the trust is so plain that a court of equity would not hesitate to compel the trustee to make a conveyance to the *cestui que trust*. *Id.*
3. **CESTUI QUE TRUST COMING INTO COURT OF EQUITY TO ASSERT LEGAL TITLE** must allege that the trustee has refused the use of his name in an action at law. *Id.*
4. **IMPLIED TRUST IS ENDED AND TRUSTEE HOLDS ADVERSE TO CESTUI QUE TRUST** from the time when he manifests an intention to claim and enjoy as his own the land subject to the trust, by failing to make a conveyance to the *cestui que trust* at the time agreed upon, and by taking out a patent for the land in his own name. *De Cordova v. Smith*, 136.

See BANKRUPTCY AND INSOLVENCY, 5; CORPORATIONS, 18; CO-TENANCY, 6, 7; EQUITY, 8; EXECUTIONS, 9; SCHOOLS, 3; STATUTE OF LIMITATIONS, 6.

TRUSTEE PROCESS.

See EQUITY, 8.

UNDUE INFLUENCE.

See WILLS, 9-15.

UNINCORPORATED SOCIETIES.

See CORPORATIONS, 11; SUBSCRIPTION

UNKNOWN HEIRS.

See EQUITY.

UNLAWFUL DETAINER.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

UNRECORDED DEEDS.

See DEEDS; MORTGAGES, 6.

USAGE.

1. **USAGE MAY BE PROVED TO AID IN CONSTRUING CONTRACT**, or to show the manner of discharging some duty or performing some act. But the usage

must relate to matters of fact, and not to modes of thinking. It must also be shown to be long continued, uniform, and generally known. *Car v. O'Riley*, 633.

2. USAGE IN CONFLICT WITH PLAIN, WELL-ESTABLISHED RULES OF LAW has no validity. *Id.*

USER.

See DEDICATION, 2.

USURY.

NOTE TAINTED WITH USURY IS INVALID IN GEORGIA. *Persons v. Jones*, 476. See EVIDENCE, 13; CRIMINAL LAW, 2; EQUITY, 4; STATUTE OF LIMITATIONS, 1.

VENDITIONI EXPONAS.

See EXECUTIONS, 1, 18, 22; SURETYSHIP, 5.

VENDOR AND VENDEE.

1. PURCHASER OF LAND UNDER BOND FOR TITLE, having paid the purchase money and gone into possession, holds a legal title. *Peterson v. Orr*, 484.
2. VENDOR MAY BRING EJECTMENT AGAINST VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT of purchase upon the latter's failure to comply with the terms of the contract. *Seabury v. Stewart*, 254.
3. POSSESSION OF VENDEE UNDER EXECUTORY CONTRACT IS NOT ADVERSE to his vendor. *Id.*
4. VENDEE FAILING TO COMPLY WITH CONTRACT IS NOT ENTITLED TO COMPENSATION FOR IMPROVEMENTS made by him while in possession, upon recovery of the premises by the vendor. *Id.*
5. VENDOR HAS ELECTION TO TREAT VENDEE AS TENANT OR TRESPASSER where the latter has been let into possession and fails to comply with his contract. *Id.*
6. VENDEE IN POSSESSION UNDER EXECUTORY CONTRACT IS NOT ENTITLED TO NOTICE OF RESCISSION before ejectment by the vendor, where he fails to pay according to contract. *Id.*
7. VENDOR CONVEYING TO STRANGER AFTER DEFAULT OF VENDEE in possession in not paying according to contract does not release the latter or render his possession adverse to the vendor's grantee, and the latter stands in the vendor's shoes; so where the vendor's executors, having power to sell, convey to a stranger after the vendee's default. *Id.*
8. VENDEE CAN NOT AVAIL HIMSELF OF OUTSTANDING TITLE DISCLOSED BY VENDOR in his evidence, or by a grantee of the vendor, so as to prevent a recovery in ejectment, where he is in possession under a contract of purchase, and is in default as to payment. *Id.*

See CO-TENANCY, 1; INJUNCTIONS, 7; STATUTE OF FRAUDS.

VENUE.

See CRIMINAL LAW, 22; PLEADING AND PRACTICE, 21; STATUTES, 1.

VERDICT.

See CRIMINAL LAW, 28; JURY AND JURORS; NEW TRIAL.

VESSELS.

See EVIDENCE, 27; SHIPPING.

VESTED RIGHTS.

See CONSTITUTIONAL LAW.

VOID JUDGMENTS.

See EXECUTIONS, 37; JUDGMENTS, 7-11, 13, 14; PROCESS, 1.

WAGERS.

See GAMING.

WAGES.

See MASTER AND SERVANT; SHIPPING, 1-4.

WAIVER.

See CO-TENANCY, 8, 9; FACTORS, 2-4; MASTER AND SERVANT, 4; NEGOTIABLE INSTRUMENTS; PLEADING AND PRACTICE, 8; PROCESS, 8; STATUTE OF LIMITATIONS, 9.

WARDS.

See GUARDIAN AND WARD.

WAREHOUSEMEN.

See BAILMENTS, 1.

WARRANTS.

See PROCESS, 3, 4, 7.

WARRANTY.

See BONDS, 1; COVENANTS, 5; INSURANCE—MARINE; NEGOTIABLE INSTRUMENTS, 4, 5, 24; SALES, 10-13.

WASTE.

See AGENCY, 6.

WATERCOURSES.

1. **TERM "NAVIGABLE RIVER"** IN COMMON LAW applies to those rivers in which the tide ebbs and flows. *Stuart v. Clark's Lessee*, 49.
2. **TERM "NAVIGABLE RIVER"** IN CIVIL LAW applies to those rivers capable of being navigated regardless of the ebb and flow of the tide. *Id.*
3. **OWNERSHIP OF SOIL COVERED BY WATERS OF NAVIGABLE RIVER** is vested in the public. *Id.*
4. **OWNERSHIP OF SOIL COVERED BY WATERS OF UNNAVIGABLE RIVER** is vested in the riparian proprietors. *Id.*
5. **PROPERTY IN WATER IS USUFRUCTUARY**, and consists not so much in the ownership of the fluid itself as the advantage of its use. *Eddy v. Simpson*, 408.
6. **PARTY OVER WHOSE LAND STREAM FLOWS** has a right to its reasonable use during its passage. The right is not in the *corpus* of the water, and only continues with its possession; nor can a party reclaim water that he has lost. *Id.*
7. **RIPARIAN RIGHTS.**—Plaintiff established a dam and acquired a water right upon a certain stream. Defendant did likewise upon another stream. After defendant had used the water at his dam it found its way by natu-

ral courses into plaintiff's stream above his said dam. Defendant afterwards erected a dam above plaintiff's, and interfered with his flow of water, claiming the right to withdraw from said stream as much water as flows into it from his first-mentioned stream. *Held*, that when the water left defendant's dam he lost all right to and interest in it, and when it joined the stream in possession of plaintiff, plaintiff became entitled thereto, and defendant could not withdraw it. *Id.*

8. BY COMMON LAW, ALL THAT PORTION OF LAND ON TIDE-WATERS between high-water mark and low-water mark, technically known as the "shore," originally belonged to the crown, and was held in trust by the king for public uses, and was not the subject of private property without a special patent or grant. *Pike v. Monroe*, 751.
9. ORDINANCE OF 1641 VESTS TIDE-LANDS IN PROPRIETOR OF ADJOINING UPLAND, subject only to the limitations and qualifications contained in the proviso to the ordinance. *Id.*
10. DEED BOUNDED ON RIVER IN WHICH TIDE EBBS AND FLOWS conveys the flats in front of and adjoining the same, to the extent of one hundred rods from high-water mark, if they extend so far. *Id.*
11. OWNER OF UPLAND, TO WHICH FLATS ADJOIN, MAY SELL UPLAND WITHOUT FLATS, or the flats without the upland, or both together. *Id.*

See BOUNDARIES; CONTRACTS, 2.

WAYS.

See EASEMENTS; RAILROADS, 3, 4.

WHARFINGERS.

See BAILMENTS.

WILLS.

1. DEVISE OF NET PROFITS OF LAND IS DEVISE OF LAND ITSELF for such time as the profits are devised. *Earl v. Rowe*, 714.
2. DEVISE OF ONE THIRD OF NET PROFITS OF LAND is a devise of one third of the land, and does not authorize the inference that the devisee was to receive the profits from the other devisees of the land, and not from the estate. *Id.*
3. DEVISEE OF UNDIVIDED PART OF TRACT OF LAND MAY RECOVER to the extent of the undivided interest before partition. *Young v. Adams*, 654.
4. ALL ESTATE, RIGHT, OR INTEREST IN LANDS acquired by a testator after making his will, and of which he died seised or possessed, passes in like manner as if owned by him at the making of the will, if such appears to be his intention. *Wynne's Lessee v. Wynne*, 66.
5. DEVISE, "I give to my much beloved wife, Micha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others;" *held*, that all the real property owned by the testator at his death, whether acquired prior or subsequently to the date of the will, passed to his wife. *Id.*
6. DEVISE MUST BE TREATED AS OF MONEY AND NOT OF LAND, when by the provisions of a will real estate was to be converted into money, and that money distributed among the devisees; nor does it make any difference in this respect that the legal title descended to the devisees to whom the money is to be paid when the land is sold. *Baker v. Copenbarger*, 600.

7. **DEVISEES MAY ELECT TO TAKE LAND ITSELF INSTEAD OF MONEY**, if all are competent to elect, where a devise is made of money to be produced by the sale of land; but the character of the devise can not be thus changed from money to land except by the concurrent action of all the devisees. *Id.*
8. **FEME COVERT MAY ELECT TO TAKE LAND INSTEAD OF MONEY**, into which the land is directed by will to be converted; but the election can only be made under the same forms and solemnities as by law are required to enable her to convey her fee. *Id.*
9. **UNDUE INFLUENCE TO INVALIDATE WILL MUST DESTROY FREE AGENCY** of the testator, in a measure amounting to moral coercion preventing the exercise of due testamentary discretion, and solicitations, arguments, and persuasions of affection, though they may sway his mind, are not enough. *Gilbert v. Gilbert*, 268.
10. **TESTATOR'S ACTS AND DECLARATIONS BEFORE AND AT MAKING OF WILL**, showing friendly or affectionate feelings for a son or other relative excluded therefrom, are competent evidence on the question of undue influence. *Id.*
11. **ACTS OF OFFICIOUS INTERMEDDLING WITH TESTATOR** tending to harass him, and showing a purpose to hurry him into the execution of his will without deliberation, are evidence of undue influence. *Id.*
12. **TESTIMONY OF RELATIVES OF TESTATOR THAT THEY NEVER HEARD OF WILL** until a short time before offer for probate, though they lived near the testator, is incompetent on the question of undue influence. *Id.*
13. **TO PROVE THAT DESTRUCTION OF WILL WAS PROCURED BY UNDUE INFLUENCE**, evidence showing what took place in the sick-room between the time the will was sent for and its return and destruction, and also showing the motive by which the party exerting the undue means was influenced, is admissible as part of the *res gesta*. *Batton v. Watson*, 504.
14. **IN PROVING THAT DESTRUCTION OF WILL WAS PROCURED BY UNDUE INFLUENCE**, those attempting to set the will up are not obliged to rely upon the testimony of the principal actor in the supposed fraud, but may show the facts by the evidence of third persons. *Id.*
15. **IF TESTATOR WAS UNDULY INFLUENCED BY FEAR, favor, or affection, or any other cause unduly exercised, to destroy his will, and such undue influences operated as a pressure and restraint upon the deceased, under the circumstances in which he was placed at the time, so as to take away his free and voluntary mind and will, and so continued up to his death, the will will be set up.** *Id.*

See MARRIED WOMEN, 5; PARTITION.

WITNESSES.

1. **AGENT IS INCOMPETENT TO TESTIFY FOR HIS PRINCIPAL** unless the latter has released him. *Otis v. Thom*, 303.
2. **PROPONENT OF WILL, WHETHER EXECUTOR OR NOT, IS INCOMPETENT WITNESS** to support it, being liable for costs. *Gilbert v. Gilbert*, 268.
3. **WITNESS'S LIABILITY TO ESTATE HAVING BEEN RELEASED** by one of several joint administrators, he is no longer disqualified on the ground of interest. *Shaw v. Berry*, 702.
4. **TESTIMONY OF WITNESSES WHICH IS MERE MATTER OF OPINION** is inadmissible as evidence. *Otis v. Thom*, 303.

5. STATEMENT OF WITNESS "that he thought if the steamboat had returned to the assistance of the flat boat when the call for assistance was made the stage could have been saved," is mere matter of opinion, and therefore inadmissible. *Id.*
6. IMPEACHMENT OF WITNESS BY PROOF OF CONTRADICTIONARY STATEMENTS.—
A witness may be impeached by proving that he has made statements out of court contradictory to those made by him on the trial, without first inquiring of him, on cross-examination, whether he has made such prior contradictory statements. *Hedge v. Clapp*, 424.
7. ENGLISH RULE FIRST RECOGNIZED IN QUEEN'S CASE, 2 Brod. & B. 301, that a witness can not be impeached by proving that he has made contradictory statements out of court, unless he has been first inquired of touching such contradictory statements, has never been adopted in Connecticut, either by legislative enactment or judicial decision. Although this rule is a safe and conservative one, calculated to protect the just rights of witnesses and to elicit the truth, and one to which it is very proper to adhere, subject to such exceptions as a sound discretion may suggest, yet a failure to apply it will not be ground for reversal of the judgment, particularly in a case where the witness was still within the reach and subject to the control of the party calling him, after the impeaching testimony had been given, and where he might have been called for the purpose of explanation. *Id.*

See CRIMINAL LAW, 25, 26, 40; EVIDENCE, 21, 27.

WRITS.

See MANDAMUS; QUO WARRANTO.

WRIT OF ENTRY.

See MORTGAGE, 11.

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